SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No.

THE STATE OF FLORIDA, EX REL., BENJAMIN F. FINLEY, PETITIONER,

vs.

THE BOARD OF CONTROL OF FLORIDA, A BODY CORPORATE UNDER THE LAWS OF THE STATE OF FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

INDEX

	Original	Print
Proceedings in Supreme Court of Florida	1	1
Caption (omitted in printing)	1	
Petition for alternative writ of mandamus	2	1
Order granting petition for alternative writ	9	4
Alternative writ of mandamus	11	4
Motion to quash alternative writ	16	8
Order denying motion to quash	18	8
Answer of respondents, J. Thomas Gurney, et al. to alternative writ	22	9
Answer of respondents, Board of Control, et al. to alternative writ	32	15
Exhibit "A"—Resolution of Board of Control, December 21, 1949	41	22
Motion for peremptory writ of mandamus, filed January 19, 1950	45	24
Opinion, Sebring, J., upon motion for peremptory writ	47	25
Motion for peremptory writ of mandamus, filed May 16, 1951	51	27
Opinion, per curiam, on motion for peremptory writ	54	28
Motion directing certification of record	56	29
Clerk's certificate (omitted in printing)	57	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPT. 12, 1951

—7071

[fol. 1] [Caption omitted]

[fol. 2]

IN THE SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA, ex rel., BENJAMIN F. FINLEY, Plaintiff,

vs.

THE BOARD OF CONTROL OF FLORIDA, a body corporate under the laws of the State of Florida, J. THOMAS GURNEY, N. B. JORDAN, THOMAS W. BRYANT, J. HINSON MARKHAM, and HOLLIS RINEHART, as members of the Board of Control of the State of Florida; J. HILLIS MILLER, as President of the University of Florida, and R. S. JOHNSON, as Registrar of the University of Florida, Respondents

PETITION FOR ALTERNATIVE WRIT OF MANDAMUS—Filed May 25, 1949

To the Honorable Judges of the Above Styled Court:

Your petitioner, Benjamin F. Finley, respectfully presents unto the Court:

1

That your petitioner is a citizen and a resident of Marion County; that the respondent, the Board of Control of Florida, is a body corporate created by the laws of the State of Florida and its principal office and place of business is in Tallahassee, Leon County, Florida; that the respondent, J. Thomas Gurney, is a citizen and resident of Orange County, Florida and is the duly appointed, qualified and acting member and chairman of said Board of Control; that the respondent, N. B. Jordan, is a citizen and resident of Gadsden County, Florida, and is a duly appointed, qualified and acting member of said Board of Control; that the respondent Thomas W. Bryant, is a citizen and resident of Polk County, Florida, and is a duly [fol. 3] appointed, qualified and acting member of said Board of Control; that the respondent, J. Hinson Markham, is a citizen and resident of Duval County, Florida, and is a duly appointed, qualified and acting member of said Board of Control; that the respondent, Hollis Rinehart,

is a citizen and resident of Dade County, Florida, and is a duly appointed, qualified and acting member of said Board of Control; that the respondent, J. Hillis Miller, is a citizen and resident of Alachua County, Florida, and is the duly appointed and qualified president of said University of Florida; that the respondent, R. S. Johnson, is a citizen and resident of Alachua County, Florida, and is the duly appointed and qualified registrar of said University of Florida.

2

That the petitioner desires to study agriculture at the graduate school at the University of Florida which is supported and maintained by the taxpayers of the State of Florida and has been arbitrarily refused admission to said University.

3

That the petitioner has a B.S. Degree from Florida A. & M. College.

4

That on or about the 4th day of April, A. D., 1949, your petitioner, duly applied for admission to the University of Florida for the purpose of entering the graduate school for the study of agriculture. He then possessed, and still possesses, all the scholastic, moral and other lawful qualifications prescribed by the Constitution and Statutes of the State of Florida, by the Board of Control of the State of Florida and by all the duly authorized officers and agents of said Board of Control and the University of Florida. He was then, and is still, ready and willing to pay all uniform fees and charges and to conform to all lawful uniform rules and regulations established by lawful authority for admission to said class.

[fol. 4] 5

That contrary to the usual and customary procedure, the respondent, R. S. Johnson, forwarded petitioner's application to the respondent, the Board of Control, and thereafter, to-wit: the 13th day of May, A. D., 1949, your petitioner, by and through his attorney, did appear before said Board of Control at a regular meeting of said Board of Control in Tallahassee, Leon County, Florida, for a

hearing upon his application for admission to the University of Florida graduate school. That at said hearing the respondents, J. Thomas Gurney, N. B. Jordan, Thomas W. Bryant, J. Hinson Markham and Hollis Rinehart, did deny the application of your petitioner and did refuse to grant him admission to the graduate school for the study of agriculture at the University of Florida, and did then and there announce that said application was denied solely because of certain provisions of the Constitution and Statutes of the State of Florida which deny the right of your petitioner admission to the said University solely because of your petitioner's race and color, thus denying unto your petitioner the equal protection of laws solely on the ground of his race and color, contrary to the Constitution of the United States.

6

That the University of Florida is the only University in the State of Florida supported and maintained by the taxpayers of the State of Florida which a graduate course in the study of agriculture is offered.

7

That the respondents, J. Hillis Miller, as president of the University of Florida and R. S. Johnson, as registrar, have refused to admit your petitioner to the University of Florida, solely because of race and color, thus denying your petitioner equal protection of the law, while at the same time admitting white applicants with less qualifications than your petitioner.

[fol. 5] 8

The petitioner further shows that he has no speedy, adequate remedy at law and that unless a Writ of Mandamus is issued he will be denied the right and privilege of pursuing the course of instruction at the University of Florida as hereinabove set out.

Your petitioner further shows unto this Court that the question involved in this proceeding is a special and peculiar question of law, an early decision of which, will avoid litigation in other cases which will be controlled by force of the decision of this case, that the respondents

herein are a State Board, State offices, and other agencies, authorized to represent the public generally and that this is a case in which this Honorable Court should exercise its original jurisdiction.

Wherefore, your petitioner prays the issuance of an alternative writ commanding the respondents herein, within the time set by this Court, to admit your petitioner into the said University of Florida or to show this Court for their refusal so to do.

/s/ Benjamin F. Finley, Petitioner, /s/ Alex Akerman, Jr., Attorney for Petitioner, 401 First National Bank Building, Orlando, Florida.

[fols. 6-8] *Duly sworn to by Benjamin F. Finley and Alex Akerman, Jr. Jurats omitted in printing.*

[fols. 9-10] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ORDER GRANTING PETITION FOR ALTERNATVE WRIT—June 10, 1949

Upon consideration of the petition of relator for an Alternative Writ of Mandamus in this cause, it is ordered that such writ issue returnable in thirty days from the date of said writ.

[fol. 11] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ALTERNATIVE WRIT OF MANDAMUS—June 10, 1949

The State of Florida to the Board of Control of Florida, a body corporate under the laws of the State of Florida, J. Thomas Gurney, N. B. Jordan, Thomas W. Bryant, J. Hinson Markham, and Hollis Rinehart, as Members of the Board of Control of the State of Florida: J. Hillis Miller, as President of the University of Florida, and R. S. Johnson, as Registrar of the University of Florida, greeting:

Whereas, upon the sworn petition filed herein by the relator Benjamin F. Finley it has been made to appear:

1

That your petitioner is a citizen and a resident of Marion County; that the respondent, the Board of Control of Florida, is a body corporate created by the laws of the State of Florida and its principal office and place of business is in Tallahassee, Leon County, Florida; that the respondent, J. Thomas Gurney, is a citizen and resident of Orange County, Florida and is the duly appointed, qualified and acting member and chairman of said Boa[illegible] of Control; that the respondent, N. B. Jordan, is a citizen and resident of Gadsden County, Florida, and is a duly appointed, qualified and acting member of said Board of Control; that the respondent Thomas W. Bryant, is a citizen and resident of Polk County, Florida, and is a duly [fol. 12] appointed, qualified and acting member of said Board of Control; that the respondent, J. Hinson Markham, is a citizen and resident of Duval County, Florida, and is a duly appointed, qualified and acting member of said Board of Control; that the respondent, Hollis Rinehart, is a citizen and resident of Dade County, Florida, and is a duly appointed, qualified and acting member of said Board of Control; that the respondent, J. Hillis Miller, is a citizen and resident of Alachua County, Florida, and is the duly appointed and qualified president of said University of Florida; that the respondent, R. S. Johnson, is a citizen and resident of Alachua County, Florida, and is the duly appointed and qualified registrar of said University of Florida.

2

That the petitioner desires study agriculture at the graduate school at the University of Florida which is supported and maintained by the taxpayers of the State of Florida and has been arbitrarily refused admission to said University.

3

That the petitioner has a B. S. Degree from Florida A. & M. College.

4

That on or about the 4th day of April, A. D., 1949, your petitioner, duly applied for admission to the University of Florida for the purpose of entering the graduate school for the study of agriculture. He then possessed, and still possesses, all the scholastic, moral and other lawful qualifications prescribed by the Constitution and Statutes of the State of Florida, by the Board of Control of the State of Florida and by all the duly authorized officers and agents of said Board of Control and the University of Florida. He was then, and is still, ready and willing to pay all uniform fees and charges and to conform to all lawful uniform rules and regulations established by lawful authority for admission to said class.

[fol. 13] 5

That contrary to the usual and customary procedure, the respondent, R. S. Johnson, forwarded petitioner's application to the respondent, the Board of Control, and thereafter, to-wit: the 13th day of May, A. D., 1949, your petitioner, by and through his attorney, did appear before said Board of Control at a regular meeting of said Board of Control in Tallahassee, Leon County, Florida, for a hearing upon his application for admission to the University of Florida graduate school. That at said hearing the respondents, J. Thomas Gurney, N. B. Jordan, Thomas W. Bryant, J. Hinson Markham and Hollis Rinehart, did deny the application of your petitioner and did refuse to grant him admission to the graduate school for the study of agriculture at the University of Florida, and did then and there announce that said application was denied solely because of certain provisions of the Constitution and Statutes of the State of Florida which deny the right of your petitioner admission to the said University solely because of your petitioner's race and color, thus denying unto your petitioner the equal protection of laws solely on the ground of his race and color, contrary to the Constitution of the United States.

6

That the University of Florida is the only University in the State of Florida supported and maintained by the

taxpayers of the State of Florida which a graduate course in the study of agriculture is offered.

7

That the respondents, J. Hillis Miller, as president of the University of Florida and R. S. Johnson, as registrar, have refused to admit your petitioner to the University of Florida, solely because of race and color, thus denying your petitioner equal protection of the law, while at the same time admitting white applicants with less qualifications than your petitioner.

[fols. 14-15] 8

The petitioner further shows that he has no speedy, adequate remedy at law and that unless a Writ of Mandamus is issued he will be denied the right and privilege of pursuing the course of instruction at the University of Florida as hereinabove set out.

Your petitioner further shows unto this Court that the question involved in this proceeding is a special and peculiar question of law, an early decision of which, will avoid litigation in other cases which will be controlled by force of the decision of this case, that the respondents herein are a State Board, State offices, and other agencies, authorized to represent the public generally and that this is a case in which this Honorable Court should exercise its original jurisdiction.

Now, therefore, these are to command you the said Board of Control of Florida, a body corporate under the laws of the State of Florida, J. Thomas Gurney, N. B. Jordan, Thomas W. Bryant, J. Hinson Markham, and Hollis Rinehart, as members of the Board of Control of the State of Florida; J. Hillis Miller, as President of the University of Florida, and R. S. Johnson, as Registrar of the University of Florida to admit Benjamin F. Finley to the school of Agriculture of the said University of Florida as a student therein, or in the alternative, that you in your respective capacities in which you are herein joined, do show cause, if any you have, before this court on the 11th day of July, 1949 why peremptory writ of mandamus should not issue herein, and have you then and there this writ.

Witness the Honorable Alto Adams, Chief Justice of the Supreme Court of Florida and the seal of said court at Tallahassee, the Capital, this 10th day of June, 1949.

/s/ Guyte P. McCord, Clerk Supreme Court of Florida. (Seal.)

[fols. 16-17] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

MOTION TO QUASH—Filed July 11, 1949

Comes now the respondents in the above styled cause, by their attorneys, and move the court to quash the alternative writ of mandamus herein, and for grounds of said motion show:

(1) The relator has other adequate remedy at law.

(2) The relator has not complied with conditions precedent to a demand for the writ of mandamus.

(3) The relator has not made use of the means and manner provided by law to obtain his lawful demands.

Respectfully submitted, Richard W. Ervin, Attorney General, Frank J. Heintz, Assistant Attorney General, Attorneys for Respondents.

[fol. 18] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ORDER DENYING MOTION TO QUASH—December 8, 1949

[fols. 19-21] Upon consideration of the motion of counsel for Respondents to quash the alternative writ of mandamus heretofore issued herein, it is ordered that said motion be and the same is hereby denied and respondents are allowed thirty days from this date to file answer in this cause.

[fol. 22] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ANSWER OF RESPONDENTS, J. THOMAS GURNEY, THOMAS W. BRYANT, AND J. HENSON MARKHAM, TO ALTERNATIVE WRIT OF MANDAMUS—Filed January 7, 1950

The respondents, J. Thomas Gurney, Thomas W. Bryant, and J. Henson Mark*a*hm, for answer to the alternative writ of mandamus issued in this cause, say:

1

They admit the matters and facts alleged in paragraph numbered 1 of said alternative writ, except that they are no longer members of the Board of Control, nor is J. Thomas Gurney Chairman of said Board, as hereinafter more particularly set out.

2

They admit that the relator, at the time of the filing of his petition, desired to study agriculture at the graduate level at the University of Florida, and that the University of Florida is supported and maintained by the State of Florida, and the taxpayers thereof, and that the relator was refused admission to said University. Respondents [fol. 23] deny that the refusal of admission was arbitrary, and say that, on the contrary, admission of relator would have been, and would now be, unlawful, for reasons hereinafter set out.

3

They admit the matters and facts alleged in paragraph numbered 3 of said alternative writ.

4

They admit the matters and facts alleged in paragraph numbered 4 of said writ, except they deny that the relator, at the time of his application for admission, possessed, or now possesses, all lawful qualifications prescribed by the constitution and statutes of the State of Florida, the Board of Control and duly authorized officers and agents of the Board and of the University of Florida, in that the relator

is a member of the negro race, and under the laws of the State of Florida, the rules and regulations of the Board of Control, which laws, rules and regulations govern the officers and agents of said Board and University of Florida, admission to the University of Florida is permissible only to white students.

5

They admit that respondent, R. S. Johnson, Registrar of the University of Florida, forwarded petitioner's application to the Board of Control, and show that it was his duty so to do under the laws of the State of Florida and the rules and regulations of the Board of Control; and they admit that at a regular meeting of the Board of Control, on May 13, 1949, in Tallahassee, Florida, the relator appeared by his attorney for a hearing upon his application for admission to the University, and that at said meeting, attended by a majority of the members of the Board [fol. 24] of Control, the Board denied the application of relator and refused to grant his admission to the graduate school of agriculture at the University of Florida, because, under the constitution and statutes of the State of Florida, the relator, being a member of the negro race, could not be lawfully admitted to the University of Florida; but these respondents deny that such action on the part of the Board of Control was or is denial to the petitioner of equal protection of the laws on the ground of race or color or contrary to the constitution of the United States. At that time, the Board of Control informed relator, through his attorney, that because there was then no actually functioning State institution of higher learning open to members of the negro race, where the courses of study he desired were offered, the Board was prepared to provide for him such courses of study at a college or university agreeable to him in another state, fully equal and as valuable as any such course offered at any tax supported institution of higher learning in the State of Florida.

6

They admit that at the time of relator's application, the graduate school of agriculture at the University of Florida was the only tax supported and maintained school of agriculture at graduate level in the State of Florida at which

a graduate school level of agriculture was actually functioning and in operation, but since that time there has been authorized, ordered set up and provided for, a graduate school of agriculture at Florida Agricultural and Mechanical College for Negroes, at Tallahassee, Florida, which is a State supported and maintained institution of higher learning of the State of Florida within the State.

7

They admit that J. Hillis Miller, as President, and R. S. [fol. 25] Johnson, as Registrar of the University of Florida, respondents, refused to admit the relator to the University of Florida, but in so doing they acted under superior authority of the Board of Control and the statutes and constitution of the State of Florida, and deny that such action on their part was denial to the relator of equal protection of the law; and deny that they were at the same time admitting white applicants with less qualifications than the relator.

8

They deny that the relator has no adequate remedy at law other than the writ of mandamus for which he prays, and say that the relator does not have the right or privilege of pursuing the course of instruction requested at the University of Florida, for the reason that the relator is a member of the negro race and admission to the University of Florida is, by the laws of said State, restricted to students of the white race; and that other and substantially equal provisions for giving to relator his requested courses of study have been made, as herein set out; and they deny that the respondents have authority to represent the public generally and show that the authority of all of the respondents is limited and fixed by the statutes of the State of Florida, and subject to the supervising power and control of the State Board of Education of Florida; and the authority of the respondents, J. Hillis Miller and R. S. Johnson, is further limited and fixed by the rules and regulations of the Board of Control.

9

Further answering the alternative writ, these respondents show that at the time of relator's demand for admis-

sion to the graduate school of agriculture at the University of Florida, four other students of the negro race, scholastically qualified, demanded admission to other departments or colleges of the University of Florida, namely, the college [fol. 26] of law, chemical engineering and pharmacy which courses were offered at an institution of higher learning of the State established for white students, but not at the Florida Agricultural and Mechanical College for Negroes; that, upon being refused admission for the same reason as relator was refused admission, they filed their several petitions for mandamus, demanding their admission to the University of Florida at the same time that relator's petition was filed. Alternative writs were issued thereon by this court, presenting issues similar to those of the relator herein, and are now pending and companion cases.

10

These respondents say further, that in the constitution and statutes of the State of Florida it is provided that white and negro students shall not be taught in the same school, but that impartial provision shall be made for both. In pursuance of said constitutional and statutory requirements, the State of Florida has established and maintains certain institutions of higher learning for white students, among which are the University of Florida, at Gainesville, Florida, and the Florida State University, at Tallahassee, Florida, and has established and maintains an institution of higher learning for negro students, the Florida Agricultural and Mechanical College for Negroes, at Tallahassee, Florida. All of said institutions have been in operation for many years. All State institutions of higher learning are under the management and control of the respondent, Board of Control, subject to the supervising power and authority of the State Board of Education of Florida. From time to time, when the need therefor arose, courses were added at said institutions of higher learning and the curricula expanded to meet reasonable demands or requests of qualified students; and it has been the long [fol. 27] established and fixed policy of the State of Florida, the Board of Control, and the State Board of Education of Florida to add additional schools and courses of

instruction at all of said institutions when sufficient demand therefor appears.

11

Whatever rights the relator may have for instruction in his requested courses at a State operated institution of higher learning within the State, if it be determined that he has such rights, would be at the Florida Agricultural and Mechanical College for Negroes, and could not be lawfully given him at the University of Florida; and the Board of Control and its member respondents have the option to provide the rights of the relator in that respect, whatever they may be, at a State operated institution of higher learning within the State other than at the University of Florida; that is, at the Florida Agricultural and Mechanical College for Negroes.

After relator's original application for admission to the summer, 1949, term of the University of Florida, he made no further application for admission to any subsequent term or semester during the time these respondents remained members of the Board of Control.

12

In pursuance of the policy set out in paragraph numbered 10 above, the Board of Control, in October, 1948, and prior to the demand of relator or other applicant, included in its budget for the ensuing biennium for the Florida Agricultural and Mechanical College for Negroes, funds for the establishment of schools or colleges or law, chemical engineering, pharmacy, journalism social work, [fol. 28] library science, and other graduate courses, for which it appeared requests might be made at said last named institution; and, shortly before its adjournment, in June, 1949, the Legislature, as was customary, made an appropriation for the Florida Agricultural and Mechanical College for Negroes, in which there were certain funds which might lawfully be used to establish and install said demanded courses of study, or some of them. It then appeared that insufficient funds would be available to satisfy the appropriations made for the several State agencies, and the State Budget Commission, in the exercise of its lawful authority, withheld a very substantial portion of all

legislative appropriations, including that for the Florida Agricultural and Mechanical College for Negroes, until additional revenue should be provided by the Legislature at a special session to be called for that purpose. At the special session, in September, 1949, additional revenue was provided for all State appropriations, including that for the Florida Agricultural and Mechanical College for Negroes, and a part, but not all, of the funds withheld have been released.

13

Further answering, these respondents show that the terms of office of the respondents, J. Thomas Gurney, Hollis Rinehart, and J. Henson Markham, who were a majority of the Board members, expired on June 27, 1949, but on request of the Governor of the State they held over until after said special session of the Legislature, when, on October 18, 1949, their successors were appointed and qualified as members of the Board of Control; and, thereupon, said three respondents ceased to be members of the Board or to have any further authority and could take no further action in the premises. These respondents are without knowledge or information, except hearsay, as to what [fols. 29-31] may have transpired in regard to the matters alleged in said alternative writ since the date when their successors qualified.

Wherefore, these respondents, having no longer any authority as to anything alleged in said writ, or claim therein, and no power to respond to any order that may be entered thereon, pray that as to them, and each of them, this proceeding be dismissed.

/s/ Richard W. Ervin, Attorney General, /s/ Frank J. Heintz, Assistant Attorney General, Attorneys for Respondents.

I do certify that copy hereof has been furnished to Alex Akerman, Jr., attorney for relator, by mail, this 7th day of January, 1950.

/s/ Frank J. Heintz, Assistant Attorney General, Attorney for Respondents.

[fol. 32] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ANSWER OF RESPONDENTS, BOARD OF CONTROL, A CORPORATION, N. B. JORDAN, HOLLIS RINEHART, J. HILLIS MILLER, AND R. S. JOHNSON, TO ALTERNATIVE WRIT OF MANDAMUS—Filed January 7, 1950

The respondents, Board of Control, a public corporation of the State of Florida, N. B. Jordan, Hollis Rinehart, J. Hillis Miller, and R. S. Johnson, for answer to the alternative writ of mandamus issued in this cause, say:

1

They admit the matters and facts alleged in paragraph numbered 1 of said alternative writ, except that respondents, J. Thomas Gurney, Thomas W. Bryant, and J. Henson Markham, are no longer members of the Board of Control, nor is J. Thomas Gurney now Chairman of said Board, as hereinafter more particularly set out.

2

They admit that the relator, at the time of the filing of his petition, desired to study agriculture at graduate level at the University of Florida, and that the University of Florida is supported and maintained by the State of Florida, and the taxpayers thereof, and that the relator was refused admission to said University. Respondents deny that the refusal of admission was arbitrary, and say that, [fol. 33] on the contrary, admission of relator would have been, and would now be, unlawful, for reasons hereinafter set out.

3

They admit the matters and facts alleged in paragraph numbered 3 of said alternative writ.

4

They admit the matters and facts alleged in paragraph numbered 4 of said writ, except they deny that the relator, at the time of his application for admission, possessed, or now possesses, all lawful qualifications prescribed by

the constitution and statutes of the State of Florida, the Board of Control and duly authorized officers and agents of the Board and of the University of Florida, in that the relator is a member of the negro race, and under the laws of the State of Florida, the rules and regulations of the Board of Control, which laws, rules and regulations govern the officers and agents of said Board and University of Florida, admission to the University of Florida is permissible only to white students.

5

They admit that respondent, R. S. Johnson, Registrar of the University of Florida, forwarded petitioner's application to the Board of Control, and show that it was his duty so to do under the laws of the State of Florida and the rules and regulations of the Board of Control; and they admit that at a regular meeting of the Board of Control, on May 13, 1949, in Tallahassee, Florida, the relator appeared by his attorney for a hearing upon his application for admission to the University, and that at said meeting, attended by a majority of the members of the Board of Control, the Board denied the application of [fol. 34] relator and refused to grant him admission to the graduate school of agriculture at the University of Florida, because, under the constitution and statutes of the State of Florida, the relator, being a member of the negro race, could not be lawfully admitted to the University of Florida; but these respondents deny that such action on the part of the Board of Control was or is denial to the petitioner of equal protection of the laws on the ground of race or color or contrary to the constitution of the United States. At that time, the Board of Control informed relator, through his attorney, that because there was then no actually functioning Florida State institution of higher learning open to members of the negro race, where the courses of study he desired were offered, the Board was prepared to provide for him such courses of study at a college or university agreeable to him in another state, fully equal and as valuable as any such course offered at any tax supported institution of higher learning in the State of Florida.

6

They admit that at the time of relator's application, the graduate school of agriculture at the University of Florida was the only tax supported and maintained school of agriculture at graduate level in the State of Florida at which a graduate level school of agriculture was actually functioning and in operation, but, since that time there has been authorized, ordered set up and provided for, a graduate school of agriculture at Florida Agricultural and Mechanical College for Negroes, at Tallahassee, Florida, which is a State supported and maintained institution of higher learning of the State of Florida within the State.

7

They admit that J. Hillis Miller, as President, and R. S. [fol. 35] Johnson, as Registrar of the University of Florida, respondents, refused to admit the relator to the University of Florida, but in so doing they acted under superior authority of the Board of Control and the statutes and constitution of the State of Florida, and deny that such action on their part was denial to the relator of equal protection of the law; and deny that they were at the same time admitting white applicants with less qualifications than the relator.

8

They deny that the relator has no adequate remedy at law other than the writ of mandamus for which he prays, and say that the relator does not have the right or privilege of pursuing the course of instruction requested at the University of Florida, for the reason that the relator is a member of the negro race and admission to the University of Florida is, by the laws of said State, restricted to students of the white race; and that other and substantially equal provisions for giving to relator his requested courses of study have been made, as herein set out; and they deny that the respondents have authority to represent the public generally and show that the authority of all of the respondents is limited and fixed by the statutes of the State of Florida, and subject to the supervising power and control of the State Board of Education of Florida; and the authority of the respondents, J. Hillis Miller and R. S.

Johnson, is further limited and fixed by the rules and regulations of the Board of Control.

9

Further answering the alternative writ, these respondents show that at the time of relator's demand for admission to the graduate school of agriculture at the University of Florida, four other students of the negro race, scholastically qualified, demanded admission to other departments or colleges of the University of Florida, namely, the Col- [fol. 36] lege of law, chemical engineering, and pharmacy, which courses were offered at an institution of higher learning of the State established for white students, but not at the Florida Agricultural and Mechanical College for Negroes; that, upon being refused admission for the same reason as relator was refused admission, they filed their several petitions for mandamus, demanding their admission to the University of Florida at the same time that relator's petition was filed. Alternative writs were issued thereon by this court, presenting issues similar to those of the relator herein, and are now pending and companion cases.

10

These respondents say further, that in the constitution and statutes of the State of Florida it is provided that white and negro students shall not be taught in the same school, but that impartial provision shall be made for both. In pursuance of said constitutional and statutory requirements, the State of Florida has established and maintains certain institutions of higher learning for white students, among which are the University of Florida, at Gainesville, Florida, and the Florida State University, at Tallahassee, Florida, and has established and maintains an institution of higher learning for negro students, the Florida Agricultural and Mechanical College for Negroes, at Tallahassee, Florida. All of said institutions have been in operation for many years. All State institutions of higher learning are under the management and control of the respondent, Board of Control, subject to the supervising power and authority of the State Board of Education of Florida. From time to time, when the need therefor arose, courses were added at said institutions of higher learning

and the curricula expanded to meet reasonable demands or requests of qualified students; and it has been the long established and fixed policy of the State of Florida, the [fol. 37] Board of Control, and the State Board of Education of Florida to add additional schools and courses of instruction at all of said institutions when sufficient demand therefor appears.

11

Whatever rights the relator may have for instruction in his requested courses at a State operated institution of higher learning within the State, if it be determined that he has such rights, would be at the Florida Agricultural and Mechanical College for Negroes, and could not be lawfully given him at the University of Florida; and the Board of Control and its member respondents have the option to provide the rights of the relator in that respect, whatever they may be, at a State operated institution of higher learning within the State other than at the University of Florida; that is, at the Florida Agricultural and Mechanical College for Negroes.

After relator's original application for admission to the summer, 1949, term of the University of Florida, he has made no further application for admission to any subsequent term or semester, and the respondents now have pending before them no application by the Relator for instruction in any course in any institution, nor are they advised as to whether relator now desires instruction in his requested courses at any future term or semester at any State institution of higher learning.

12

In pursuance of the policy set out in paragraph numbered 10 above, the Board of Control, in October, 1948, and prior to the demand of relator or other applicant, included in its budget for the ensuing biennium for the Florida Agricultural and Mechanical College for Negroes, funds for the establishment of schools or colleges of law, chem- [fol. 38] ical engineering, pharmacy, journalism, social work, library science, and other graduate courses, for which it appeared requests might be made at said last named institution; and, shortly before its adjournment, in June,

1949, the Legislature, as was customary, made an appropriation for the Florida Agricultural and Mechanical College for Negroes, in which there were certain funds which might lawfully be used to establish and install said demanded courses of study, or some of them. It then appeared that insufficient funds would be available to satisfy the appropriations made for the several State agencies, and the State Budget Commission, in the exercise of its lawful authority, withheld a very substantial portion of all legislative appropriations, including that for the Florida Agricultural and Mechanical College for Negroes, until additional revenue should be provided by the Legislature at a special session to be called for that purpose. At the special session, in September, 1949, additional revenue was provided for all State appropriations, including that for the Florida Agricultural and Mechanical College for Negroes, and a part, but not all, of the funds withheld have been released.

13

Further answering, these respondents show that the terms of office of the respondents, J. Thomas Gurney, Hollis Rinehart, and J. Henson Markham, who were a majority of the Board members, expired on June 27, 1949, but on request of the Governor of the State they held over until after said special session of the Legislature, when, on October 18, 1949, their successors were appointed and qualified as members of the Board of Control; and, thereupon, said three respondents ceased to be members of the Board or to have any further authority and could take no further action in the premises, and are now without [fol. 39] power or authority to respond to any order which may be entered herein.

14

And respondents further say that, in the meantime, the period for admission of any students, white or colored, to any of the State institutions of higher learning, at the summer term and fall term of 1949, had expired; and, on the 21st day of December, 1949, the Board of Control, as newly constituted, set up and established a graduate school of agriculture and the other courses demanded by other negro applicants, as hereinabove set out, at the Florida

Agricultural and Mechanical College for Negroes, by resolution, copy of which is hereto attached, as Exhibit A, and made a part of this answer; and the Board of Control has directed the authorities at the State institutions of higher learning to put said resolution and the things therein authorized and directed into immediate practice and effect.

As authorized in said resolution, if the relator still declines to accept out-of-state scholarship or other provision which may be made for his instruction in the courses he has requested elsewhere than at a State institution established for white students exclusively, and it should be held that said arrangement is insufficient to satisfy the relator's lawful demands, the respondent, Board of Control, has made provision for relator's immediate admission and enrollment at the Florida Agricultural and Mechanical College for Negroes, in its graduate school of agriculture established at that institution, and is ready to there admit him, provided the relator shall make his application for instruction in said course within the time allowed for members of any other group to apply for admission [fol. 40] to said course at any State institution of higher learning. And, in the event the necessary facilities, equipment and personnel for said course of study should not be immediately available, at the Florida Agricultural and Mechanical College for Negroes, in Tallahassee, upon his said renewed timely application for instruction in said course of study, the Board of Control has made provision for his instruction in said course of study, as in said resolution provided, at the only other institution of higher learning in the State of Florida offering such course, until such time as adequate and comparable facilities and personnel for such course of study, substantially equal to those provided at any tax supported institution of higher learning in the State, can be obtained and physically set up at the Florida Agricultural and Mechanical College for Negroes, in Tallahassee, Florida.

Wherefore these respondents say that relator is not entitled to peremptory writ, but the same should be denied,

the alternative writ quashed, and respondents hence dismissed.

/s/ Richard W. Ervin, Attorney General, /s/ Frank J. Heintz, Assistant Attorney General, Attorneys for Respondents.

I do certify that copy hereof has been furnished to Alex Akerman, Jr., attorney for relator, by mail, this 7th day of January, 1950.

/s/ Frank J. Heintz, Assistant Attorney General, Attorney for Respondents.

[fol. 41] EXHIBIT "A" TO ANSWER

Resolution

Whereas, for many years it has been the policy of the Board of Control to establish at the Florida Agricultural and Mechanical College for Negroes such schools and courses as may be offered at any other of the State institutions of higher learning, whenever there were a sufficient number of applicants to justify the establishment of such schools and courses, and in the meantime providing for the occasional negro applicant for education in those courses by out-of-state scholarships; and it is believed that such policy has been carried out over many years to the reasonable satisfaction of all parties concerned; and this Board reaffirms that policy; and,

Whereas, Certain negro students have demanded admission to the University of Florida, where such courses are now given, and continuation of their demands is not unlikely; and,

Whereas, The Constitution of the State of Florida requires that students of the white and negro races "shall not be taught in the same school, but impartial provision shall be made for both";

Now, therefore, in order to comply with the constitution and laws of the State of Florida, as near as may be under existing circumstances, be it resolved that there is hereby established, at the Florida Agricultural and Mechanical College for Negroes, schools of law, mechanical engineer-

ing, agriculture at graduate level and pharmacy at graduate level; and qualifications for admission to said courses shall be the same as those required for admission to said courses at other State institutions of higher learning in the State of Florida; and

Be it further resolved, That efforts to acquire the necessary personnel, facilities, and equipment for such courses be reactivated and diligently prosecuted, with the view of installing said personnel, facilities, and equipment for [fol. 42] such courses at the Florida Agricultural and Mechanical College for Negroes, at Tallahassee, Florida, at the earliest date possible, thereby to more fully comply with the Constitution and laws of the State of Florida; and that, in the meantime, and while diligent preparation is being made to physically set up said schools and courses at the Florida Agricultural and Mechanical College for Negroes, at Tallahassee, Florida, further effort to be made to arrange with said applicants for out-of-state scholarships or other arrangements agreeable to them, equal to their reasonable individual needs and affording them full and complete opportunity to obtain the education for which they have applied, where obtainable, at institutions other than Florida state operated institutions of learning for white students, and under circumstances and surroundings fully as good as may be offered at any State operated institution of higher learning in the State of Florida; and

Be it further resolved, in the event the court should hold that the foregoing provisions are insufficient to satisfy the lawful demands of said applicants, that temporarily, and only until completion of such acquisition of personnel, facilities and equipment for installation at the Florida Agricultural and Mechanical College for Negroes, at Tallahassee, comparable to those in institutions of higher learning of the State established for white students, the Florida Agricultural and Mechanical College for Negroes shall arrange for supplying said courses to its enrolled and qualified students at a Florida state operated institution of higher learning, where said courses may be given, and there the instructional personnel and facilities of such institution in the requested courses shall be provided and used for the education of said applicants at such times and places, and in such manner, as the latter institution may

prescribe; and the authorities of such last described state operated institution of higher learning shall cooperate in [fols. 43-44] making such arrangements, to the end that there shall be available to said students of the Florida Agricultural and Mechanical College for Negroes, substantially equal opportunity for education in said courses as may be provided for white students under like circumstances. In providing such education, the authorities of both institutions shall at all times observe all requirements of the laws of the State of Florida in the matter of segregation of the races, etc.

Be it further resolved, That such instruction and facilities to be provided by the State institution of higher learning, temporarily, as herein directed, shall be provided in such manner as will insure to graduates in such courses the same privileges and benefits as may be accorded by law to graduates of the same courses in institutions of higher learning in the State established for white students.

Be it further resolved, That actual cost of supplying said instruction shall be accurately determined and the institution reimbursed therefor from such funds appropriated for the Florida Agricultural and Mechanical College for Negroes as may lawfully be used for that purpose.

[fols. 45-46] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

MOTION FOR PEREMPTORY WRIT—Filed January 19, 1950

Comes now the Relator, Benjamin F. Finley, and moves the Court to issue a Peremptory Writ of Mandamus directed to the Respondents, Board of Control of Florida; N. B. Jordan and Hollis Rinehart as members of the Board of Control of Florida; J. Hillis Miller as President of the University of Florida; and R. S. Johnson as Registrar of the University of Florida, requiring said Respondents to admit Relators to the University of Florida, the Answer of said Respondents notwithstanding, and as grounds for said Motion says:

1. That the allegations contained in the Answer filed by said Respondents wholly fail to set forth any legal reason why a Peremptory Writ should not issue.

/s/ Alex Akerman, Jr., Attorney for Relator.

I do certify that copy hereof has been furnished Richard W. Ervin, Attorney General and Frank J. Heintz,

Assistant Attorney General, attorneys for respondents, by mail, this 17th day of January, A. D., 1950.

/s/ Alex Akerman, Jr., Attorney for Relator.

[fol. 47] IN THE SUPREME COURT OF FLORIDA

June Term, A. D. 1950

En Banc

THE STATE OF FLORIDA, ex rel., BENJAMIN F. FINLEY, Relator,

vs.

BOARD OF CONTROL, a Body Corporate, etc., et al., Respondents

Mandamus

A case of original jurisdiction—Mandamus.

Richard W. Ervin, Attorney General and Frank J. Heintz, Assistant Attorney General, for Respondents.

OPINION—Filed August 1, 1950

Sebring, J.

The relator, Benjamin F. Finley, is a negro citizen and resident of the State of Florida. Except as to the matter of race and color, he possesses all the scholastic, moral and other qualifications prescribed by the laws of Florida and the rules and regulations of the State Board of Control for admission to the University of Florida, a state supported institution of higher learning maintained exclusively for white students.

In April 1949 Finley applied for admission to the University of Florida for the purpose of entering the graduate school for the study of agriculture. His application was denied on the sole ground that he was a member of the negro race. Finley thereupon instituted this mandamus [fol. 48] action, alleging the matters above set forth, averring that the University of Florida is the only tax-supported university in the State at which courses of agriculture for graduate students are offered, and charging that the refusal of the governing authorities to admit him solely

because he was a negro constituted an arbitrary and illegal denial of the equal protection of the laws guaranteed him by the Fourteenth Amendment to the Federal Constitution.

In due course the members of the Board of Control filed their return to the alternative writ issued in the cause. In their return the Board set up the same defenses as were filed by the Board of Control in State ex rel. Hawkins v. Board of Control, this day decided, and offered to the relator, Finley, the same opportunities in respect to graduate courses in agriculture as were made available to the relator in that case with reference to law school training; that is to say, offered him the opportunity to secure instruction in a graduate school of agriculture at a university or college outside the State of Florida, where negro students are eligible for admission, and as an alternative, offered to enroll him at the Florida Agricultural and Mechanical College for Negroes, in the graduate school of agriculture recently established by the Board at that institution and to make temporary provision for his instruction in the graduate school of agriculture at the University of Florida, in the event the necessary facilities, equipment and personnel for said course of study should not be immediately available at the Florida Agricultural and Mechanical College for Negroes at the time of his enrollment.

A motion has been made for the issuance of a peremptory writ notwithstanding the return filed by the respondents, on the ground that the opportunities offered to the relator do not afford him the equal protection of the laws guaranteed by the Federal Constitution.

[fols. 49-50] Every question raised by the parties in this suit has been considered and decided by this court in State ex rel. Hawkins vs. Board of Control, supra, and hence it follows that the opinion and judgment rendered in that cause should control the disposition that should be made of the case at bar.

It is so ordered.

Adams, C. J., Terrell, Chapman, Thomas, Hobson and Roberts, JJ., concur.

[fol. 51] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

MOTION FOR PEREMPTORY WRIT—Filed May 16, 1951

Comes now the Relator, Benjamin F. Finlay by his undersigned Attorney and moves the Court to issue a Peremptory Writ of Mandamus directed to the Respondents, Board of Control of Florida; N. B. Jordan and Hollis Rinehart as members of the Board of Control of Florida; J. Hollis Miller as President of the University of Florida; and R. S. Johnson Registrar of the University of Florida, requiring said Respondents to admit Relator to the University of Florida, the Answer of said Respondents notwithstanding, and as grounds for said Motion says:

1. That the Respondents have failed to provide Relator the equal educational opportunities in accordance with the interlocutory order of this Court rendered on August 1, 1950; that Relator hereby applies for further relief in this cause in accordance with the Court's mandate and requests this Court to issue a peremptory writ of mandamus at this time as prayed for in Relator's complaint requiring the Respondents to admit him instanter to the University of Florida in order that he may thereby receive educational opportunities and advantages equal to those available to white persons at the University of Florida.

[fols. 52-53] 2. That the Relator has exhausted all reasonable means available to him for attaining admittance to the University of Florida the only institution in the State of Florida supported and maintained by the taxpayers of the State of Florida offering courses necessary to obtaining the degree in his chosen profession; that the creation of the purported school of agriculture on paper for Negroes at the Florida A. & M. College and/or the alternative plan adopted by the Board of Control of Florida and made a part of the laws as required by the Fourteenth Amendment to the Constitution of the United States.

3. That on August 1, 1950, when the Court handed down a decision in this cause, the Respondents had made available, on paper, agricultural education at the Florida A. & M. College for Negroes; that in fact there is no agri-

cultural education at the Florida A. & M. College; and that the only state-supported institution where Relator can secure educational opportunities and advantages for an agricultural education equal those available to white students is at the University of Florida; that no steps have been made to provide Relator with agricultural educational opportunities and advantages within the state since the decision of this Court, on August 1, 1950; and that Relator has now lost one whol*d* year in which he could have been pursuing an agricultural education.

Wherefore, in accordance with the decision of this Court, on August 1, 1950, Relator hereby applies for further relief and requests the Court to issue a peremptory writ of mandamus ordering his admission as a regular student in the Agricultural School at the University of Florida.

/s/ H. E. Hill, Attorney for Relator.

[fols. 54-55] IN THE SUPREME COURT OF FLORIDA

June Term, A. D. 1951, En Banc

Supreme Court #21,140

THE STATE OF FLORIDA, ex rel., BENJAMIN F. FINLEY, Relator,

vs.

BOARD OF CONTROL, a body corporate, etc., et al., Respondents

A Case of original jurisdiction—Mandamus.

H. E. Hill, for Relator.

Richard W. Ervin, Attorney General and Frank J. Heintz, Assistant Attorney General, for Respondents.

OPINION—Filed June 15, 1951

Per Curiam.

The motion for the entry of a peremptory writ of mandamus notwithstanding the return filed by the Respondents in this proceeding is denied on authority of the ruling in The State of Florida, ex rel., Virginia D. Hawkins, Relator, vs. Board of Control, a body corporate, etc., et al., Respondents, rendered this 15th day of June, 1951.

Sebring, C. J., Terrell, Chapman, Adams, Hobson and Roberts, J.J., Concur.

Thomas, J., Not Participating.

[fol. 56] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

MOTION DIRECTING CERTIFICATION OF RECORD—Filed August 15, 1951

Comes now the Relators by their attorney undersigned and thereby directing the Clerk to certify the entire record in the above styled cause, including pleadings, testimony and exhibits, if any.

/s/ H. E. Hill, 525 Second Avenue, Daytona Beach, Florida, Attorney for Relators.

Certificate of Service

I do hereby certify that copy hereof have been furnished by (mail) (delivery) this 14th day of August 1951 to: Richard T. Ervin, Attorney General.

/s/ H. E. Hill, Attorney.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. —

STATE EX REL HAWKINS, et al., Petitioners,

vs.

BOARD OF CONTROL

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 15th, 1951.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated this 13th day of September, 1951.

[fol. 30] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

MOTION FOR PEREMPTORY WRIT AND FINAL JUDGMENT—
Filed May 28, 1952

Comes now the Relator, Benjamin F. Finley, by his undersigned attorney and moves this Honorable Court to issue a Peremptory Writ of Mandamus directed to Respondents, Board of Control of Florida; N. B. Jordan and Hollis Rhinehart as members of the Board of Control; and R. S. Johnson, Registrar of the University of Florida, requiring said Respondents to admit Relator to the University of Florida and for Final Judgment in said cause, the answer of said Respondents notwithstanding, and as grounds for said Motion says:

I

That since the rendition of the Courts initial opinion in the case of State ex rel. Hawkins vs. Board of Control of Florida, et al., 47 So. 2d 608 et seq., the Relator has re-applied and made due and regular reapplication for enrollment and admission to the School of Agriculture at the University of Florida and has complied with all requirements necessary for enrollment and admission at said institution to no avail and is beset with obstacles wholly beyond the intendment of his constitutional rights and the essentials of human well-being and beyond any recognized constitutional social expediency; the Relator having exhausted his remedies save and except the relief to be afforded by this Honorable Court.

II

That the judgment heretofore rendered by this Honorable Court in this said cause is a nisi order and interlocutory in its nature and not an appealable judgment. That the Relator desires to take an appeal therefrom but is precluded from so doing unless this Court enters a Final [fols. 31-32] Judgment and to that end the Relator stands on his pleadings as filed herein.

III

That all pleadings have been submitted, issues joined and proof taken and being conscious of the morality and justice of his cause as now here contended for thus submit himself to this Honorable Court to the end that a Peremptory Writ of Mandamus be granted as prayed for and that a Final Judgment be entered in this cause.

Wherefore, Relator moves this Honorable Court for the issuance of a Peremptory Writ of Mandamus and that Final Judgment be entered in the above entitled cause.

(S.) H. E. Hill, 525½ Second Avenue, Daytona Beach, Florida.

[fols. 33-34] IN THE SUPREME COURT OF FLORIDA, JUNE TERM, A. D. 1952, EN BANC

THE STATE OF FLORIDA, ex rel. BENJAMIN F. FINLEY, Relator,

vs.

BOARD OF CONTROL, a Body Corporate, etc., et al., Respondents

MANDAMUS, SUPREME COURT #21,140

A case of original jurisdiction—Mandamus.

H. E. Hill, for Relator.

Richard W. Ervin, Attorney General and Frank J. Heintz, Assistant Attorney General, for Respondents.

OPINION—Filed August 1, 1952

SEBRING, C. J.:

This is a companion case to State ex rel. Hawkins v. Board of Control, — So. 2d —, decided this 1st day of August, 1952. The conclusions reached therein apply equally to the contentions presented in this case.

The motion for peremptory writ should be denied, the alternative writ heretofore entered should be quashed, and the cause should be dismissed at the cost of the relator.

It is so ordered.

Terrell, Thomas, Hobson, Roberts and Mathews, J.J., and Hocker, Associate Justice, Concur.

[fol. 35] In the Supreme Court of Florida

[Title omitted]

Motion—Filed August 12, 1952

Come now the Relators, by their undersigned attorney, and direct the Clerk to certify the entire record respectively in the above styled cause, to wit:

1. Petition for Alternative Writ of Mandamus.
2. Order Granting Petition for Alternative Writ of Mandamus.
3. Alternative Writ of Mandamus.
4. Respondents Motion to Quash.
5. The Order Denying Respondents Motion to Quash.
6. Answer of Respondents.

[fol. 36] 7. Relators Motion for Peremptory Writ.

8. Opinion of the Court, Aug. 1, 1950.
9. Relators Motion for Peremptory Writ.
10. Opinion of the Court, June 15, 1951.
11. Relators Motion Directing Certification of Record.
12. Relators Motion for Peremptory Writ and Final Judgment.

(S.) H. E. Hill, 525½ Second Avenue, Daytona Beach, Florida, Attorney for Relators.

Certificate of Service omitted in printing.

[fol. 37] Clerk's Certificate to foregoing transcript omitted in printing.

11

FILED
SEP 14 1951
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 325 9

STATE OF FLORIDA EX REL VIRGIL D. HAWKINS, ET AL.,

Petitioners,

vs.

BOARD OF CONTROL, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

ROBERT L. CARTER,
THURGOOD MARSHALL,
Counsel for Petitioners.

JACK GREENBERG,
HORACE HILL,
Of Counsel.

INDEX

Subject Index

	Page
Petition for Writ of Certiorari	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Specifications of Error	6
Reasons for Allowance of the Writ	6
Conclusion	10

Table of Cases

McKissick v. *Carmichael*, 187 F. 2d 949 (CCA 4th, 1951), cert. den. — U. S. —, June 4, 1951	9
McLaurin v. *Board of Regents*, 339 U. S. 637	9
Missouri ex rel. Gaines v. *Canada*, 305 U. S. 337	8
Plessy v. *Ferguson*, 163 U. S. 537	8
Sipuel v. *Board of Regents*, 332 U. S. 631	8
Sweatt v. *Painter*, 339 U. S. 629	9
Wilson v. *Board of Supervisors*, 94 L. ed. (Adv. Op.) 200	9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 325

STATE OF FLORIDA EX REL VIRGIL D. HAWKINS, ET AL.,

Petitioners,

vs.

BOARD OF CONTROL, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgments of the Supreme Court of Florida, entered in the above-entitled cases on June 15, 1951.

Opinions Below

Opinions of the Supreme Court of Florida were entered on August 1, 1950, and on June 15, 1951. The August 1,

1950 and June 15, 1951 opinions in *State ex rel Hawkins* v. *Board of Control* are reported in 47 So. 2d 608, (R. 25) [1] and in 53 So. 2d 116, respectively (R. 40); in *State ex rel Boyd* v. *Board of Control,* 47 So. 2d 619, and 53 So. 2d 120, respectively; in *State ex rel Lewis* v. *Board of Control,* 47 So. 2d 617, and 53 So. 2d 119; in *State ex rel Finley* v. *Board of Control,* 47 So. 2d 620 and 53 So. 2d 119; in *State ex rel Maxey* v. *Board of Control,* in 47 So. 2d 618, and 53 So. 2d 119.

Jurisdiction

The Supreme Court of Florida on June 15, 1951, denied petitioners' motions for peremptory writs of mandamus and for further relief as provided in its orders of August 1, 1950 (R. 40). Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3). At each and every stage of these proceedings, in the motions for alternative writs of mandamus, in the alternative writs themselves, in the motions for peremptory writs of mandamus filed on January 19, 1950 (R. 24), and in the motions for peremptory writs of mandamus and for further relief filed on May 16, 1951 (R. 39), petitioners grounded their claims in the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Throughout these proceedings, petitioners have raised, relied upon and preserved the federal questions which are brought before this Court in this petition.

Questions Presented

1. Can the State refuse to admit petitioners to the University of Florida solely because of race and color for the

[1] All record citations are to the record in the *Hawkins* case since the printing of the other records was not completed at the time this petition was sent to the printers. The only difference in the cases are the names of petitioners.

pursuit of graduate education and training in law without violating petitioners' rights to the equal protection of the laws as guaranteed under the Fourteenth Amendment to the Constitution of the United States.

2. On the basis of a resolution of the Board of Control ordering the establishment at the Florida A & M College for Negroes of the courses which petitioners seek to pursue and which provides for petitioners' admission to the University of Florida on a segregated basis in the event the courses desired are not available at Florida A & M College at the time petitioners seek to enroll therein, especially where the answers filed conclusively show that the courses ordered established at Florida A & M College were not in fact in actual operation, can the State of Florida avoid its constitutional obligation of immediately admitting petitioners to the University of Florida.

Statement

The cases of *State ex rel Hawkins, State ex rel Lewis, State ex rel Boyd, State ex rel Finley* and *State ex rel Maxey* v. *Board of Control* were brought in the court below as separate and independent causes. All five cases involve the same questions and were disposed of in the same manner in the court below. One petition covering all five cases, therefore, is being filed in this Court.

On April 4, 1949, petitioners made due and timely application for admission to the University of Florida, a public institution maintained and operated by the State for the higher education of its citizenry. Virgil Hawkins and William T. Lewis applied for admission to the School of Law; Rose Boyd for admission to the School of Pharmacy; Oliver Maxey for courses leading to a graduate degree in Chemical Engineering; and Benjamin Finley for courses leading to a graduate degree in agriculture. As of the time of their

respective applications, and as of now, petitioners were and are fully qualified in every legal respect for admission to the University of Florida. Moreover, they would have been admitted without question but for the fact that they are Negroes.

Their applications were referred to the Board of Control, respondents here, which governs and controls the entire university system of the State of Florida. On May 13, 1949, petitioners met with the Board of Control. At this meeting they were advised that the only state institution in Florida where the courses of study they desired could be pursued was at the University of Florida, but that in view of the laws of the state they could not be admitted to the University of Florida since it was maintained exclusively for white persons. The Board offered to pay petitioners' tuitions to institutions of their choice outside the state (R. 16-17).

Whereupon, petitioners instituted the instant action by filing petitions for alternative writs of mandamus in the Supreme Court of Florida (R. 1). These petitions were granted on June 10, 1949 (R. 4). Respondents' motions to quash were denied on December 8, 1949 (R. 9), and on January 7, 1950 the respondents filed their answers (R. 9).

Respondents admitted that petitioners were refused admission to the University of Florida solely because they are Negroes. It was admitted that at the time of petitioners' applications that the University of Florida was the only state institution offering courses in law, graduate agriculture, pharmacy and chemical engineering. The answers further alleged that authorization had been given by the Board of Control, in the form of a resolution dated December 21, 1949 for Florida A & M College for Negroes to provide the courses of study which petitioners sought to pursue (R. 21). The Board resolution recited that if the courses desired were not available at Florida A & M College,

when petitioners made application for admission thereto, and in the event the offer of out-of-state aid to petitioners should be held not to satisfy the state's constitutional obligations, petitioners would be admitted temporarily to the University of Florida on a segregated basis until such time as courses in question became available at Florida A & M College (R. 22).

On January 19, 1950, petitioners filed motions for peremptory writs of mandamus notwithstanding respondents' answers. The court held these petitions to be in the nature of demurrers in that they admitted the truth of respondents' allegations of fact. The court held that for the purpose of decision on petitioners' motions for peremptory writs of mandamus notwithstanding respondents' answers, the allegation by the Board of Control that as of December 21, 1949, it had ordered the establishment of Schools of Law, Pharmacy, Graduate Agriculture and Chemical Engineering at Florida A & M College and had ordered reactivation of the necessary effort to secure equipment and personnel and offered to temporarily admit petitioners to the University of Florida, on a segregated basis, until such time as these schools were actually in operation at the Negro College sufficiently satisfied the state's constitutional obligation to furnish equal educational opportunities (R. 32-38). The court refused, however, to enter a final order and retained jurisdiction of the cases in order to permit either petitioners or respondents to come before the court at some later date to seek whatever further relief might then be warranted (R. 38).

Petitioners reapplied to the University of Florida for the courses desired on August 7, 1950. On May 16, 1951, not having been admitted to or enrolled in any institution for the courses desired, petitioners filed motions for peremptory writs of mandamus and for further relief in accord-

ance with the court's opinion of August 1, 1950. On June 15, 1951, these motions were denied (R. 40). Whereupon, petitioners bring the causes here.

Specification of Error

1. The court erred in refusing to grant petitioners' motions for peremptory writs of mandamus filed on January 19, 1950 when respondents' answers clearly showed that courses petitioners desired were available only at the University of Florida.

2. The court erred in refusing to grant petitioners' original motions for peremptory writs of mandamus notwithstanding respondents' answers where the December 21, 1949, resolution, on which respondents rely, clearly showed that no courses in law, chemical engineering, graduate agriculture and pharmacy were actually available or in operation at Florida A & M College for Negroes.

3. The court erred in refusing to issue a decree ordering petitioners immediate admission to the University of Florida subject only to the same rules and regulations which are applicable to all other persons.

4. The court erred in refusing to grant petitioners' subsequent motions for peremptory writs of mandamus and for further relief filed in May 1951 in view of the fact that between the date of its opinion on August 1, 1950 and the date of the filing of petitioners' motions on May 16, 1951, petitioners had not been provided with educational opportunities of any nature while the courses they were qualified to pursue were being offered white students at the University of Florida.

Reasons for Allowance of the Writ

1. The December 21, 1949 resolution of the Board of Control, which the Florida Supreme Court held to afford

petitioners equal protection of the laws, reads in part as follows:

> "... there is hereby established, at the Florida Agricultural and Mechanical College for Negroes, schools of law, mechanical engineering, agriculture at graduate level and pharmacy at graduate level; and qualifications for admission to said courses shall be the same as those required for admission to said courses at other State institutions of higher learning in the State of Florida; ...
>
> "... efforts to acquire the necessary personnel, facilities, and equipment for such courses be reactivated and diligently prosecuted, with the view of installing said personnel, facilities, and equipment for such courses at the Florida Agricultural and Mechanical College for Negroes, at Tallahassee, Florida, at the earliest date possible, thereby to more fully comply with the constitution and laws of the State of Florida; and that, in the meantime, and while diligent preparation is being made to physically set up said schools and courses at the "Florida Agricultural and Mechanical College for Negroes, at Tallahassee, Florida, further effort to be made to arrange with said applicants for out-of-state scholarships or other arrangements agreeable to them, equal to their reasonable individual needs and affording them full and complete opportunity to obtain the education for which they have applied, where obtainable, at institutions other than Florida state operated institutions of learning for white students, and under circumstances and surroundings fully as good as may be offered at any State operated institution of higher learning in the State of Florida; ...
>
> "... in the event the court should hold that the foregoing provisions are insufficient to satisfy the lawful demands of said applicants, that temporarily, and only until completion of such acquisition of personnel, facilities and equipment for installation at the Florida Agricultural and Mechanical College for Negroes, at Tallahassee, comparable to those in institutions of higher learning of the State established for white students,

> the Florida Agricultural and Mechanical College for Negroes shall arrange for supplying said courses to its enrolled and qualified students at a Florida state operated institution of higher learning, where said courses may be given, and where the instructional personnel and facilities of such institution in the requested courses shall be provided and used for the education of said applicants at such times and places, and in such manner, as the latter institution may prescribe; and the authorities of such last described state operated institution of higher learning shall cooperate in making such arrangements, to the end that there shall be available to said students of the Agricultural and Mechanical College for Negroes, substantially equal opportunity for education in said courses as may be provided for white students under like circumstances. In providing such education, the authorities of both institutions shall at all times observe all requirements of the laws of the State of Florida in the matter of segregation of the races, etc . . ." (R. 22).

This resolution clearly shows that no courses in law, graduate agriculture, pharmacy or chemical engineering were actually being offered at Florida A & M College. Hence, no reliance whatsoever could possibly be placed by respondents on the state's segregation laws, even assuming, as did the court below, that the *Plessy* v. *Ferguson*, 163 U. S. 537, doctrine of "separate but equal" governed the disposition of petitioners' claims. Petitioners were unquestionably entitled to admission to the University of Florida, it being the only state institution actually offering the courses they desired to pursue. *Missouri ex rel Gaines* v. *Canada*, 305 U. S. 337; *Sipuel* v. *Board of Regents*, 332 U. S. 631. The decision of the court below that the resolution of December 21, 1949 afforded petitioners equal protection of the laws is in further direct conflict with the

Sipuel case where this Court held that Negro applicants must be furnished educational opportunities as soon as such facilities are made available to white persons.

2. The practice of any form of segregation based on race and color at the professional and graduate school level of state universities violates the equal protection clause of the Fourteenth Amendment, *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Board of Regents*, 339 U. S. 637; *Wilson* v. *Board of Supervisors*, 94 L. Ed. (Adv. Op.) 200; *McKissick* v. *Carmichael*, 187 F. 2d 949 (CCA 4th 1951), cert. den. — U. S. —, June 4, 1951. Thus the approval by the court below of the December 21, 1949 resolution, which at best would permit petitioners' temporary admission to the University of Florida on a segregated basis, is in direct conflict with these cited cases.

It should be pointed out that in the *Sweatt* case, where the segregated Negro law school was held not to afford petitioner equal educational opportunities, that the law school had been in operation for several years; that in the *Wilson* case a Negro law school had been functioning at Southern University in Louisiana for at least five years; and that in the *McKissick* case the law school at the North Carolina College for Negroes had been in continuous operation since 1939. Yet all three schools were found inferior to the law school operated at the main State university. Here, on the other hand, there wasn't even a semblance of a law school or graduate school but merely a directive to reactivate and diligently prosecute efforts to procure necessary equipment, personnel and facilities to get the desired courses of study functioning.

3. The decision of the court below that petitioners must first apply to Florida A & M College for Negroes, and the courses they desire not be there available, before being

entitled to admission to the University of Florida is in direct conflict with the decisions of this Court in *Missouri ex rel Gaines* v. *Canada, supra; Sweatt* v. *Painter, supra.* It is admitted that petitioners had made due and timely application to the University of Florida. They were wrongfully and illegally refused admission, whereas white persons were accepted. Having proved their qualifications and the respondents' wrongful denial of their applications, petitioners were entitled to an affirmative and unconditional decree ordering respondents to immediately admit them to the University of Florida subject only to the same rules and regulations applicable to all other persons.

4. The denial by the court below of petitioners' motions for peremptory writs of mandamus and for further relief filed on May 16, 1951 in which it was recited that respondents had failed to provide petitioners with equal educational opportunities was contrary to decisions of this Court in which the question of equal educational opportunities has been decided, *Sipuel* v. *Board of Regents, supra; Sweatt* v. *Painter, supra.* The state has failed in its obligation to furnish petitioners equal educational opportunities, and petitioners were entitled to issuance of peremptory writs of mandamus ordering their admission to the University of Florida.

Conclusion

Since the decisions of the court below in these cases are directly contrary to the decisions of this Court, as set forth *supra,* it is respectfully submitted that this petition for writ of certiorari should be granted and the causes reversed and remanded without hearing, with instructions to the court below that it issue a decree ordering that petitioners be admitted to the University of Florida, forthwith, subject

only to the same rules and regulations applicable to all other students.

THURGOOD MARSHALL,
ROBERT L. CARTER,
Counsel for Petitioners.

JACK GREENBERG,
HORACE HILL,
Of Counsel.

(7154)

INDEX AND TABLE OF CASES

Subject Index

	Page
Opinions Below	1
First Opinion	1
Second Opinion	2
Third Opinion	2
Jurisdiction	2
Question Presented	2
Statement of Case	3
Argument	8
Conclusion	17

CITATIONS

Cases Cited:

Fisher vs. Hurst, 333 U. S. 147, 92 L. Ed. 604, 68 S. Ct. 389	16
Gong Lum vs. Rice, 275 U. S. 78, 72 L. Ed. 172, 48 S. Ct. 91	14
Chesapeake & Ohio Ry. vs. Kentucky, 179 U. S. 388, 45 L. Ed. 244	13
Chiles vs. Chesapeake & Ohio Ry., 218 U. S. 71, 54 L. Ed. 936	13
Hall vs. DeCuir, 95 U. S. 485, 24 L. Ed. 547	12

Page

McCabe vs. A. T. & S. F. R. Co., 235 U. S. 151, 59 L. Ed. 169, 35 S. Ct. 69..... 13

McKissick vs. Carmichael, 187 F. 2d 949, Cert. Denied, 341 U. S. 951, 95 L. Ed. 1374..... 10

McLaurin vs. Oklahoma Board of Regents, 339 U. S. 637, 94 L. Ed. 1149, 70 S. Ct. 851.... 10

Missouri ex rel Gaines vs. Canada, 305 U. S. 337, 83 L. Ed. 208, 59 S. Ct. 232..... 15

Plessy vs. Ferguson, 163 U. S. 537, 41 L. Ed. 256, 16 S. Ct. 1138..... 12

Sipuel vs. Oklahoma Board of Regents, 332 U. S. 631, 92 L. Ed. 247, 68 S. Ct. 299.....9, 16

Sweatt vs. Painter, 339 U. S. 629, 94 L. Ed. 1114, 70 S. Ct. 848.....10, 16

Wilson vs. Board of Supervisors, 340 U. S. 909, 95 L. Ed. 657..... 10

STATUTES CITED:

28 USCA, 1257 (3)..... 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

NO. 430

STATE OF FLORIDA EX REL
VIRGIL D. HAWKINS, et al.,
PETITIONERS,

vs.

BOARD OF CONTROL, et al.,
RESPONDENTS.

ON PETITIONS FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

There have been three opinions of the Supreme Court of Florida, as follows:

First Opinion

The first opinion, dated August 1, 1950, involving petitioner Virgil D. Hawkins (R. 25) is reported in 47 So. 2d 608; the opinion involving Rose Boyd (R. 25) is reported in 47 So. 2d 619; the opinion involving petitioner Oliver Maxey (R. 24) is reported in 47 So. 2d 618; the opinion involving petitioner Benjamin Finley (R. 25) is reported in 47 So. 2d 620.

Second Opinion

The second opinion of the Supreme Court of Florida was entered on July 15, 1951. The opinion in the Hawkins Case (R. 40) is reported in 53 So. 2d 116; in the Boyd Case (R. 28) reported in 53 So. 2d 120; in the Maxey Case (R. 27) reported in 53 So. 2d 119, and in the Finley Case (R. 28) in 53 So. 2d 119.

Third Opinion

The third opinion of the Supreme Court of Florida was entered on August 1, 1952. The opinion in the Hawkins Case (R. 47) is reported in 67 So. 2d 162; in the Boyd Case (R. 32) reported in 67 So. 2d 166; in the Maxey Case (R. 31) reported in 67 So. 2d 166, and in the Finley Case (R. 31) reported in 67 So. 2d 166.

Jurisdiction

On petitioners' refusal to proceed further in the Florida court and their demands for final judgment, the Supreme Court of Florida, on August 1, 1952, with its third opinion, denied in each case the petitioner's third motion for peremptory writ of mandamus, quashed the alternative writ of mandamus theretofore issued, and dismissed the case. (Hawkins R. 47; Boyd R. 32; Maxey R. 31; Finley R. 31.)

Jurisdiction of this court is attempted to be invoked under Title 28, Section 1257 (3), United States Code. The petitioners predicate their claims for relief upon the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Can the State of Florida refuse to admit petitioners to the University of Florida for the

pursuit of graduate training in agriculture and chemical engineering, and professional training in law and pharmacy solely because of their race and color without violating petitioners' rights to the equal protection of the laws as guaranteed under the Fourteenth Amendment to the Constitution of the United States?

Statement of the Case

There were originally five petitioners—: Virgil Hawkins, Rose Boyd, Oliver Maxey, Benjamin Finley, and William T. Lewis. The last named appears to have withdrawn, and these proceedings are brought severally by Hawkins, Boyd, Maxey and Finley. They are companion cases presenting the same issue. For that reason, the petitioners file only one petition, and respondents only one brief in opposition.

On April 4, 1949, the petitioners applied for admission to the University of Florida, which is an institution of higher learning maintained and operated by the State at Gainesville, Florida. State statutes provide that only students of the white race may be admitted. Petitioner Hawkins applied for admission to the school of law; petitioner Boyd to the school of pharmacy; petitioner Maxey applied for courses in graduate level chemical engineering, and petitioner Finley applied for courses in graduate level agriculture.

Petitioners' applications were referred to the respondent, Board of Control, which is the agency of the State having complete control and management of the State's institutions of higher learning, subject at all times to the supervision of the State Board of Education of Florida. At a hearing on May 13, 1949, the petitioners, all of whom are members of the negro race,

were informed that under the laws of the State of Florida they could not be admitted to the University of Florida; that the schools and courses for which petitioners had applied had prior thereto been authorized and ordered to be set up at the Florida Agricultural and Mechanical College for Negroes, a State supported and maintained institution of higher learning located at Tallahassee, Florida, but said courses had not then actually been installed, and for this reason petitioners were offered out-of-state scholarships equal to any courses offered at any tax supported institution within the State of Florida (Hawkins R. 16-17; Finley R. 16-17; Boyd R. 16-17; Maxey R. 15-16).

The petitioners refused to accept the scholarships offered, and filed in the Supreme Court of Florida their petitions for alternative writs of mandamus, (R. 1) and the petitions were granted (R. 4). Thereupon, the respondents filed motions to quash (R. 8) and these motions were denied by order of December 8, 1949 (R. 8).

The summer school for which applicants applied had expired a long time before respondents' answer was due, and there was no further application by the petitioners for any subsequent term or session at the University of Florida until 1952.

On January 7, 1950, respondents filed their answers. (The record shows two separate answers. The first answer, appearing in the record on Page 9, was the answer of three members of the Board of Control whose terms expired in June, 1949, and those answers make no reply to anything which transpired subsequent to the end of their terms. Otherwise, the two answers are identical. The more complete answer was that of

the Board of Control, as a corporate body, and the members of the Board whose terms continued, as well as the other respondents. This later answer, to which reference will be made, appears in the record—Hawkins, R. 15; Boyd R. 15; Finley R. 15; Maxey R. 14).

In their answers the respondents referred to the laws of the State of Florida which prohibit the admission of any other than white students at the University of Florida; that in the absence of actually functioning schools or courses requested by the applicants, out of state scholarships, fully equal to any schools or courses offered at any tax supported institution within the State had been offered to the applicants; that prior to petitioners' applications there had been authorized and ordered set up the schools and courses requested by the applicants at the Florida Agricultural and Mechanical College for Negroes at Tallahassee, another institution of higher learning of the State of Florida under the management of the respondents.

The answers further showed that in the meantime the Board of Control, as newly constituted, by resolution of December 21, 1949, had established at Florida Agricultural and Mechanical College for Negroes, for applicants and others similarly situated, who might make timely application, the courses and schools requested by applicants. (Hawkins R. 21; Boyd R. 20; Finley R. 20; Maxey R. 20.) They further showed that by its resolution of December 21, 1949, applicants, upon making timely applications, would be admitted to their requested courses in said Florida Agricultural and Mechanical College for Negroes; and, further, that in the event that necessary and equal facilities, equipment and personnel for any of said courses were not immediately available at the last named institution at the

time application might be made, provision had been made for applicants' instruction in said courses at the University of Florida until such time as adequate and comparable facilities and personnel for courses of study substantially equal to those at the University of Florida should be functioning at said Florida Agricultural and Mechanical College for Negroes (R. 20) (The Resolution is set out in full, Hawkins, R. 22; Boyd, R. 22; Finley R. 22; Maxey R. 21.)

On January 19, 1950, petitioners filed their motion for peremptory writ of mandamus, notwithstanding respondents' answer (Hawkins, R. 24; Boyd, R. 24; Finley, R. 24; Maxey, R. 23).

In its opinion of August 1, 1950, the Supreme Court of Florida held that the petitioners' motions for peremptory writ was the equivalent of a demurrer and operated as an admission of facts well pleaded by respondents; that the respondents' answer raised two questions: (1) whether out of state scholarships offered applicants accorded the petitioners equal protection of the law under the Fourteenth Amendment to the Constitution, and (2), if not, did the program set up by the Board of Control, (Resolution of December 21, 1949, Hawkins R. 22; Boyd R. 22; Finley R. 22; Maxey R. 21) satisfy the rights of the petitioners.

The Florida court, following this court's decisions, held that the out of state scholarships were not sufficient compliance with the Fourteenth Amendment. It further held, however, that the plan provided by the Board of Control accorded petitioners full rights under that amendment, and that it fully satisfied the State's obligation to furnish petitioners with equal educational oppor-

tunities (Hawkins R. at pages 32-38; Boyd R. at 26; Finley R. at 26; Maxey R. at 25)

Notwithstanding its conclusion, the Florida court retained jurisdiction of the cases until it be shown by either party that the Board of Control had, or had not, failed to furnish petitioners, after due application, such opportunities and facilities for pursuing their desired courses of study as are substantially equal to those afforded to the students enrolled in like courses at the University of Florida.

Following that opinion, which was dated August 1, 1950, the petitioners permitted the case to remain dormant until May 16, 1951, when they filed another motion for peremptory writ of mandamus (Hawkins R. 39; Boyd R. 27; Finley R. 27; Maxey R. 25). On June 15, 1951, the Florida court found that petitioners had made no proof or showing of re-application, or as to whether or not there had been established at the Florida Agricultural and Mechanical College for Negroes the courses desired, as required by the court's original opinion. The court denied the petition for peremptory writ, but again retained jurisdiction in order that either party might make proof that equal opportunities and facilities had, or had not, been provided for the petitioners (Hawkins R. 40; Boyd R. 28; Finley R. 28; Maxey R. 27).

Petition for writ of certiorari was filed in this court, but it was denied (November 13, 1951) because the Florida court's judgment of June 15, 1951, was not a final judgment, ... U. S. ....., 96 L. ed. 65.

Again, the cases remained dormant until on May 28,

1952, when petitioners filed another motion for peremptory writ in which they declined to proceed further, standing upon the pleadings as filed and demanding final judgment (Hawkins R. 45; Boyd R. 31; Finley R. 30; Maxey R. 29). The Florida court again found that petitioners had failed to submit any proof as to the equality or inequality of the opportunities provided for them at the Florida Agricultural and Mechanical College for Negroes, or that facilities there provided did not afford to them the guarantees to which they were entitled under the Constitution. The court further found that schools and courses demanded by the petitioners were functioning and in operation at the Florida Agricultural and Mechanical College for Negroes, and that the courses were similar in content and quality to those offered at the University of Florida; that it has all of the required facilities, faculty, students and equipment. The court further found that petitioners had persistently refused to apply for admission to the Florida Agricultural and Mechanical College for Negroes. On petitioners' demand for final judgment the court denied the motions for peremptory writ, quashed the alternative writs theretofore issued, and dismissed the causes. (Hawkins R. 47; Boyd R. 32; Finley R. 31; Maxey R. 31.)

Argument

In their petition, under the heading "Opinions Below," the petitioners greet the court with the statement that these cases have now been pending for more than two years. They close their "Statement of the Case" with the averment that two years after the initial decision the court below, on August 1, 1952, entered its final judgment dismissing the cases. The pointed manner in which the statements are made seem to imply

that the petitioners have had to wait a long time for a final judgment. Surely it was not intended to mislead this court into believing that there is similarity to the case of Sipuel vs. Oklahoma Board of Regents, 332 U. S. 631, 92 L. ed. 247, 68 S. Ct. 299, in which the circumstances persuaded this court to summarily order the admission of the applicant because of what the court there considered inexcusable delay of the Oklahoma authorities. The fact of the matter is, as shown by the record, that the petitioners could have had final judgment immediately after the first opinion of the court on August 1, 1950, had they asked for it. Or they could have had a hearing on the equality of facilities immediately after the opinion of August 1, 1950; the Supreme Court of Florida retained jurisdiction of the case for that purpose. The record shows that notwithstanding the retention of jurisdiction by the Supreme Court of Florida to hear proof on the question of equality or lack of equality of educational facilities provided for them, petitioners at no time offered any proof whatever or made any move in that direction, and that at no time asked for final judgment until just prior to the third opinion, which was entered on August 1, 1952. The record shows that whatever delay there may have been in reaching a final judgment or to obtain any other appropriate relief was due to the failure of the petitioners to move or ask for it.

Petitioners contend that the "separate but equal" decisions of this court are error.

This court has repeatedly answered the petitioners' question and re-affirmed the validity of that principle. The answer to petitioners question is that the State may refuse to admit petitioners to the University of Florida because of their race or color without violating

the Constitution of the United States by providing for them separate but equal facilities in a comparable tax supported institution within the State as promptly as it provides them for white students in institutions established for the latter.

Petitioners state in their argument that "whether the courses which petitioners seek are now being offered on a segregated basis is, we submit, beside the point. Any distinctions based upon race or color at the professional and graduate school level of state universities violate the equal protection clause of the Fourteenth Amendment." They cite in support of that statement Sweatt v. Painter, 339 U. S. 629, 94 L. ed. 1114; McLaurin v. Oklahoma State Regents, 339 U. S. 637, 94 L. ed 1149; Wilson v. Board of Supervisors, 340 U. S. 909, 95 L. ed 657; McKissick v. Carmichael, 187 F. 2d 949 (C. A. 4th 1951); cert. den. 341 U. S. 951, 95 L. ed 1374.

Those cases did not abolish the "separate but equal" principle. In fact, the court found in those cases that the schools provided for the negro students were not equal to those provided for white students. In so determining, the court actually followed that doctrine. In each of those cases there was proof and evidence submitted as to the white and negro schools. The petitioners here very carefully avoided any proof or evidence as to the courses at the University of Florida on the one hand, and the courses at the Florida Agricultural and Mechanical College for Negroes on the other, presumably to submit the question of segregation in schools unencumbered by any question of fact as to whether or not the separate facilities were equal. The length of time during which a law school or any other course has been in existence at any institution does not determine the ques-

tion. It may be one factor in appraising a school, but it is not at all controlling.

Petitioners refer to the proposed admission to the University of Florida under certain conditions on a segregated basis. The Board of Control's resolution provides that upon the failure to supply equal facilities at the Florida Agricultural and Mechanical College for Negroes the students shall be admitted to the University of Florida and the institution "shall at all times observe all of the requirements of the laws of the State of Florida in the matter of segregation of the races, etc." There is no showing that there would be segregation of any negro admitted to the University of Florida under the Board's resolution. Petitioners do not point out what may be the laws of the State of Florida applicable to such students who may be admitted to the University. The reason they do not mention it is that *there are no segregation laws of Florida applicable* to any negro students who may be admitted to the University of Florida under the Board of Control's resolution or otherwise.

The court has said that the importance of a question may affect the granting or denial of a petition for certiorari. The rights of citizens or groups of citizens are always important, but when any of such rights have been settled by repeated decisions of this court and over a long period of time, such as the "separate but equal" principle, the question ceases to have that *importance* which will require the attention of the court. The "separate but equal" principle is quite clear, and there is nothing unsettled about it. No reason has been presented to require a reconsideration of the long established doctrine. True, the question is persistent, and by what appears to be a calculated and continuous flow of cases, perhaps in the hope of wearing down the court.

It is admitted that petitioners would be within their rights in using that strategy, but it does not require appeasement.

By a line of decisions of this court dating back to the case of Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547, which was decided in *1887*, this court has announced, approved and confirmed the principle of "separate but equal" facilities. The Hall v. DeCuir case involved the question of the right of negroes to remain in cabins on steamboats reserved for whites and this court said that a statute requiring those engaged in transportation of passengers to separate white and colored passengers in Louisiana was constitutional. In a concurring opinion, one of the justices pointed out that "substantial equality of right is the law of the state and the United States, *but equality does not mean identity. . . .*" He referred also to separation of the races in the schools, and said:

> "Equality of rights does not involve the necessity of educating white and colored persons in the same school anymore than it does of educating children of both sexes in the same school, or different grades of scholars must be kept in the same school."

Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 S. Ct. 1138, was decided by this court in *1896*. It involved a Louisiana statute which required separation of races by those furnishing transportation for passengers. Plessy, a negro, refused to occupy a place set aside for negroes. This court said:

> "Laws permitting or requiring separation of the races do not necessarily imply the inferiority of any race to the other and such laws have been generally recognized as valid exercises of the legislative police power."

The court gave as the most common instance of such laws, the establishment of separate schools for white and colored children. The court pointed out that this separation of the races in schools does not affect the political equality of the negro.

The court in that case further pointed out that in determining the question of reasonableness the State is at liberty to act as "the established usages, customs and traditions of the people" and with the view of "the promotion of their comfort and the preservation of peace and good order". The statute was upheld as valid.

Chesapeake & Ohio Ry. v. Kentucky, 179 U. S. 388, 45 L. ed 244, was decided in *1900*. This case considered the validity of a Kentucky statute requiring the railroad to provide separate accommodations for white and colored passengers. This court said there was no doubt about the constitutionality of the statute.

Chiles v. Chesapeake & Ohio Ry., 218 U. S. 71, 54 L ed. 936, was decided in *1910*. Here again this court upheld the Kentucky statute requiring separation of the races. In that case the court quoted with approval the language of Plessy v. Ferguson, supra, which upheld the legislative right to consider and follow "established usages, customs and traditions of the people and the promotion of their comfort and preservation of peace and good order."

McCabe v. A. T. & S. F. Ry. Co., 235 U. S. 151, 59 L. ed. 169, 35 S. Ct. 69, was decided in *1914*. This case involved the statute requiring separation of white and colored citizens on trains and in waiting rooms. This court approved the Circuit Court's holding:

> "That it had been decided by this court, so that the question could no longer be considered an open one, that it was not an infraction of the 14th amendment for a State to require separate, but equal, accommodations for the two races."

Gong Lum v. Rice, 275 U. S. 78, 72 L. ed. 172, 48 S. Ct. 91, was decided in *1927*. It involved the statute requiring the separation of white and colored students in schools. The statute was held valid. Mr. Chief Justice Taft said:

> "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear. . . .
>
> "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow, or black. Were this a new question, it would call for very full argument and consideration but we think that is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution."

and further said:

> " 'The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.' "

He added:

> "The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment. The judgment of the Supreme Court of Mississippi is affirmed."

Missouri ex rel Gaines v. Canada, 305 U. S. 337, 83 L. ed. 208, 59 S. Ct. 232, was decided in *1938*. In that case Mr. Chief Justice Hughes said:

> "In answering petitioner's contention that this discrimination constituted a denial of his constitutional right, the state court has fully recognized the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions. 305 U. S. at 344, 83 L. ed. at 211" (Citing cases)

> "Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other Negroes sought the same opportunity. 305 U. S. at 351, 83 L. ed. at 214."

> "The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups

within the State . . . . 305 U. S. at 349, 83 L. ed. at 213"

"We are of the opinion . . . . that petitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State. 305 U. S. at 352, 83 L. ed. at 215."

Again, in *1948*, in the cases of Sipuel v. Board of Regents, 332 U. S. 631, 92 L. ed. 247, 68 S. Ct. 299, and Fisher v. Hurst, 333 U. S. 147, 92 L. ed. 604, 68 S. Ct. 389, this court recognized the doctrine of "separate but equal" facilities and later in the case of Sweatt v. Painter, 339 U. S. 629, 94 L. ed. 1114, 70 S. Ct. 848, recognized the same doctrine.

It will be observed that in many cases and over a long period of time, this court has consistently found that separate facilities do not deprive a member of the negro race of equal protection of the laws or any other of his constitutional rights, provided the facilities are substantially equal to those supplied to members of the white race.

The doctrine contains the two elements, *separation* with *equality*.

To provide equal facilities in separate schools, in some cases it is easy and simple, in others, more difficult—but in every case it is possible.

The matter of *equality* of facilities is as feasible and practicable now as it was when Chief Justices Waite, Taft, Hughes, and their illustrious associates and predecessors, wrote those decisions from as far back as 1887.

The other element of the principle—separation of the races in the enjoyment of the facilities, likewise, is the same now as then.

Separateness is no more separate now than it was in Hall vs. DeCuir, Plessy vs. Ferguson, Gong Lum vs. Rice, Missouri ex rel Gaines vs. Canada, and the other cases, supra.

Conclusion

The same reasons which supported the many decisions of this court upholding the "separate but equal" principle are as valid today as when announced in the cited decisions. The combination of equality with separation which this court's long line of decisions approved means exactly the same thing now as then,—which is to say that the decisions are as right today as when written. This court will not overturn a principle so fixed and fundamental as the "separate but equal" doctrine in the absence of an overpowering reason. Petitioners have shown no acceptable reason for the revolutionary prayer of their petitions.

Citing the decisions of this court, the Supreme Court of Florida in its first opinion (Hawkins R. 33), said: "No court in the land has ever required of a sovereign state any more than is encompassed within the plan proposed by the Board of Control in its answer. Every individual political right and privilege guaranteed the citizen by the provisions of the Federal Constitution is maintained under the program, while at the same time the right of the State to adopt such method as it finds best designed to afford substantially equal educational

opportunities to Florida citizens of different race groups has been preserved."

The petition should be denied.

Respectfully submitted,

RICHARD W. ERVIN
Attorney General

FRANK J. HEINTZ
Assistant Attorney General

RALPH M. MCLANE
Assistant Attorney General

HOWARD S. BAILEY
Assistant Attorney General

COUNSEL FOR RESPONDENTS

Office - Supreme Court
FILED
MAY 21 19[illegible]
HAROLD B. WILLEY, [illegible]

IN THE

Supreme Court of the United States

October Term, 1952

No. [redacted]85

JAMES W. MUIR,

Petitioner,

vs.

LOUISVILLE PARK THEATRICAL ASSOCIATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT L. CARTER,
THURGOOD MARSHALL,
BENJAMIN F. SHOBE,
Counsel for Petitioner.

ELWOOD H. CHISOLM,
DAVID E. PINSKY,
of Counsel.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
49

TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdiction 1

Question Presented 2

Statement 2

General Background 2

The Leasing Agreement Between the City and Respondent 4

Specifications of Error 7

Reasons For Allowance of the Writ 8

1. This case seriously affects the right of Negro citizens to enjoy the benefits of publicly-owned recreational facilities 8

2. Whether the respondent's operations in this case constitute state action presents a substantial federal question which should be independently determined by this Court 11

3. Decisions among state and lower federal courts with respect to the status of leasing arrangements between municipalities and private organizations are in conflict and should be resolved 14

4. The decision below is in conflict with principles established in decisions of this Court, particularly *Nixon* v. *Herndon* 18

5. The decision in this case is in conflict with the principles enunciated by this Court in *Nixon* v. *Condon*, *Smith* v. *Allright* and *Terry* v. *Adams* with respect to the delegation of state authority 20

PAGE

6. The decision of the Court below conflicts with well-settled doctrine of this Court that rights guaranteed under the 14th Amendment are personal and present 24

Conclusion 25

Appendix A—Agreement 26

Appendix B—Statutes of Kentucky—Applicable to Parks in Cities of the First-Class 31

Table of Cases Cited

Baskin v. Brown, 174 F. 2d 391 (C. A. 4th 1949) 21n
Beal v. Holcombe, 193 F. 2d 384 (C. A. 5th 1951) 9n
Board of Park Commissioners v. Speed, 215 Ky. 319, 285 S. W. 212 (1926) 13, 18, 20
Boyer v. Garrett, 183 F. 2d 582 (C. A. 4th 1950), cert. denied 340 U. S. 912 ..... 9n

Camp v. Recreation Board for the District of Columbia, 104 F. Supp. 10 (D. C. 1952) 9n
Culver v. City of Warren, 84 Ohio App. 373, 83 N. E. 2d 82 (1948) 9n, 12n, 15, 22

Dorsey v. Stuyvesant Town Corp., 299 N. Y. 512, 87 N. E. 2d 541 (1949), cert. denied 339 U. S. 981 22
Draper v. City of St. Louis, 92 F. Supp. 546 (E. D. Mo. 1950), appeal dismissed 186 F. 2d 307 (C. A. 8th 1950) 9n
Durkee v. Murphy, 181 Md. 259, 29 A. 2d 253 (1942) 9n

Grovey v. Townsend, 295 U. S. 45 15

Hague v. Congress of Industrial Organization, 307 U. S. 496 ..... 20n
Harris v. City of Daytona Beach, 105 F. Supp. 572 (S. D. Fla. 1952) 9n
Harris v. City of St. Louis, 233 Mo. App. 911, 111 S. W. 2d 995 (1938) 15, 16, 22

PAGE

Kern v. City Commissioners, 151 Kans. 565, 100 P. 2d 709 (1940) 9n, 12n, 15, 22

Kerr v. Enoch Pratt Free Library, 149 F. 2d 212 (C. A. 4th 1945), cert. denied 326 U. S. 721 ..... 15, 22, 23

Law v. Mayor and City Council of Baltimore, 78 F. Supp. 346 (Md. 1948) 9n

Lawrence v. Hancock, 76 F. Supp. 1004 (S. D. W. Va. 1948) 9n, 13, 15, 16, 22

Lopez v. Seccombe, 71 F Supp. 769 (S. D. Cal. 1944) 9n

McCabe v. Atchison, T. & S. F. Ry. Co., 235 U. S. 151 25

McLaurin v. Oklahoma State Regents, 339 U. S. 637 19

Missouri ex rel. Gaines v. Canada, 305 U. S. 337 19

Modern Amusements, Inc. v. New Orleans Public Service, 183 La. 848, 165 So. 137 (1935) 15, 16, 23

Nash v. Air Terminal Services, 85 F. Supp. 545 (E. D. Va. 1949) 10n, 19, 22, 23

Nixon v. Condon, 286 U. S. 73 ..... 14, 15, 20-24

Nixon v. Herndon, 273 U. S. 536 ..... 15, 18, 19, 20

Norris v. Mayor & City Council of Baltimore, 78 F. Supp. 451 (Md. 1948) 10n

Park Commissioners of Ashland v. Shanklin, 304 Ky. 43, 199 S. W. 2d 721 (1947) 13, 14, 18, 20

Public Utilities Commission of the District of Columbia v. Pollack, 343 U. S. 451 19

Rice v. Arnold, 340 U. S. 848, vacating 45 So. 2d 195 (Fla. 1950), reaffirmed 54 So. 2d 114 (Fla. 1951), cert. denied 342 U. S. 896 ..... 9n

Rice v. Elmore, 165 F. 2d 387 (C. A. 4th 1947), cert. denied 333 U. S. 875 ..... 15, 21n

Shelley v. Kraemer, 334 U. S. 1 ..... 15, 25

Sipuel v. Board of Regents, 332 U. S. 631 19

Smith v. Allwright, 321 U. S. 649 ..... 15, 20-24

PAGE

Steele v. Louisville & Nashville R. R. Co., 323 U. S. 192 15
Sweatt v. Painter, 339 U. S. 629 19
Terry v. Adams, —— U. S. ——, 21 U. S. L. Week 4346 (May 4, 1953) 15, 20-22, 24
Tunstall v. Brotherhood of Locomotive Firemen, 323 U. S. 210 15
United States v. Classic, 313 U. S. 299 15
Warley v. Board of Park Commissioners, 233 Ky. 688, 26 S. W. 2d 554 (1930) 18
Williams v. Kansas City, 104 F. Supp. 848 (W. D. Mo. 1952) 9n

Other Authorities Cited

Barnett, What is State Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution? 24 Ore. L. Rev. 227 (1945) 15n
Dulles, America Learns to Play (1940) 8n
Gardner, Recreation's Part in Mental Health, 45 Recreation 446 (1952) 8n
Hewitt, A Backward Glance at '49, 35 Equity 11 (April, 1950) 12n
Hewitt, The Survey of Summer Stock, 34 Equity 13 (April, 1949) 12n
Hjelte, The Administration of Public Recreation (1940) 8n
Institute for Training in Municipal Administration, Municipal Recreation Administration (1945) 8n
National Park Service, U. S. Dept. of Interior, Fees and Charges for Public Recreation (1939) 10n

PAGE

National Recreation Association, Recreation and Park Year Book (Mid-century edition 1951) 8n, 9n

Neumeyer, Leisure and Recreation (1936) 8n

Recreation, Encyclopedia of Social Sciences (1934). 8n

Rogers, The Child at Play (1932) 8n

Slavson, Recreation and the Total Personality (1946) 8n

Steiner, Americans at Play (1933) 8n

The Thirty-third National Recreation Congress-in Review, 45 Recreation (1951) 8n

Statutes Cited

Ky. Rev. Stat. § 97.252 (1948) 20n

Ky. Rev. Stat. § 97.290 (Baldwin's certified ed., 1942) as incorporated into Ky. Rev. Stat. § 97.250 (1948) 20n

IN THE

Supreme Court of the United States

October Term, 1952

No.

JAMES W. MUIR,

Petitioner,

VS.

LOUISVILLE PARK THEATRICAL ASSOCIATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, James W. Muir, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on February 20, 1953.

Opinions Below

The memorandum opinion of the United States District Court for the Western District of Kentucky is reported at 102 F. Supp. 525 (R. 20). The opinion of the Court of Appeals for the Sixth Circuit is not yet reported and may be found in the record at page 83.

Jurisdiction

The judgment of the Court of Appeals was entered on February 20, 1953 (R. 83). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

Whether respondent, who leases from the City of Louisville a publicly owned and maintained amphitheatre located in a public park, can refuse petitioner admission thereto on tender of the required admission fee solely because of race and color, without violating his rights to equal protection of the laws within the meaning of the Fourteenth Amendment.

Statement

General Background

Petitioner, together with two other plaintiffs below—Mona Carroll and P. O. Sweeney—brought an action in the District Court against the City of Louisville, T. Byrne Morgan, Director of Parks and Recreation for the City, and the Louisville Park Theatrical Association, respondent here. The action, brought as a class suit on behalf all other Negroes similarly situated, sought to establish the right of Negro citizens of Louisville to the use of park and recreational facilities without discrimination on account of race and color where such facilities are owned by the City and maintained in whole or in part out of public funds (R. 2-8).

The City of Louisville maintains segregated parks for its Negro and white citizens. Since 1928 regulations have been in effect whereby certain parks are designated for the exclusive use of white persons while others are maintained for the exclusive use of Negroes (R. 43). There are 21 white parks with a total acreage of 2,027 acres; in contrast, 10 parks are provided for Negroes with a combined acreage of 112 acres (R. 44-45).

While neither a golf course, a fishing lake nor an amphitheatre is provided in the Negro parks, such facilities are provided by the City in the white parks (R. 43). Plain-

tiff Sweeney, desiring to play golf, requested of the City and its Director of Parks and Recreation permission to play golf on the above City-operated golf courses. His request was admittedly denied solely because he was a Negro (R. 43). Similarly, plaintiff Carroll, an infant, through her father, asked permission to use the fishing lake in Cherokee Park. This request, too, was denied solely because of plaintiff Carroll's race and color (R. 43).

In Iroquois Park, the largest park in Louisville and one designated for the use of white persons, the City maintains an open-air amphitheatre known as Iroquois Amphitheatre (R. 46). Under an agreement with the City, the Louisville Park Theatrical Association, respondent here, presents musical entertainment during the summer season. On July 22, 1949, petitioner, James Muir, sought admission to Iroquois Amphitheatre to see a performance of "Blossom Time", a musical production presented by respondent association. Although this was a performance to which the general public could gain admission by paying an admission fee, respondent refused to sell petitioner a ticket solely because he was a Negro (R. 19, 47).

The three plaintiffs below instituted this action on July 28, 1949, seeking a declaratory judgment and injunctive relief on the ground that the refusal to admit them to the several facilities violated the right of each plaintiff to the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States (R. 2-9). A stipulation of facts was filed on August 6, 1951 (R. 18-19), and on the same date a hearing on the merits was held in the District Court (R. 41-62).

On September 14, 1951, the District Court filed its opinion and findings of fact and conclusions of law (R. 20-35). On January 18, 1952, final judgment was entered (R. 36-38). That court found that the City violated the Fourteenth Amendment in providing golf facilities for

white citizens without furnishing similar recreational facilities for Negroes. The City was enjoined from excluding plaintiff Sweeney and other Negroes from such golf courses on the basis of race and color. The District Court dismissed the complaint with respect to plaintiff Carroll on the ground that she had failed to produce any evidence to support her claim that the fishing facilities afforded Negroes were substantially inferior to those provided for white persons (R. 37). Plaintiff Carroll took no appeal.

The court also dismissed the complaint as to petitioner, holding that respondent was a private corporation not subject to the Fourteenth Amendment. The court further held that the City, in allowing respondent to lease Iroquois Amphitheatre for a "private operation for a short period of time", did not violate the Fourteenth Amendment where there was no showing that Negro organizations were not allowed to lease the Amphitheatre under similar terms on a non-discriminatory basis (R. 37). On appeal the Court of Appeals for the Sixth Circuit affirmed (R. 83).

The Leasing Agreement Between the City and Respondent

The facts with respect to the use of Iroquois Amphitheatre are not in dispute. They are contained in the stipulation of facts (R. 18-19, 42-47), three agreements entered between the Association and the City (R. 62-79) and the current agreement appended hereto as Appendix A.

In 1938, the Board of Park Commissioners of the City of Louisville erected an open-air amphitheatre in Iroquois Park (R. 18). Iroquois Amphitheatre was constructed and equipped out of public funds supplied by the Federal Works Progress Administration, with the exception of $5000 contributed by respondent (R. 18). Since 1938 a series of agreements have been in effect between the City and respondent, a non-profit domestic corporation, whereby the latter

was given the "exclusive" use of the Amphitheatre during the summer season.

The first agreement granted respondent the exclusive use of the Amphitheatre from May 1 until September 30 during the years 1938-1942 (R. 62-71). The second agreement extended these provisions for a period of five additional years (R. 71-74). The third agreement, the one in force at the time petitioner was refused admission, covered the period 1947-1951 and is substantially similar to the earlier contracts (R. 74-79).

Under the terms of this agreement, respondent was granted the exclusive use of the Amphitheatre during the period May 1 to September 30 for the purpose of rehearsing or presenting musical, dramatic, athletic or any other form of entertainment it might select (R. 74-75). Respondent was permitted to charge an admission fee, provided such admission fees and charges were "reasonable and consistent with the desire of both [the City and the Association] to increase the use of Iroquois Park by making the entertainment presented at said Amphitheatre available to the public at low cost" (R. 75-76).

Respondent was not required to pay rent. It agreed to pay the electric bill from May 1 until September 30 and the salaries of all persons employed in connection with any entertainment provided (R. 76). It further agreed to pay over to the City all net profits realized from its operations after deducting the initial $5000 contributed by it to the cost of constructing the Amphitheatre (R. 77-78).

The Association was required to furnish to the City on January 1 of each year an audited statement of monies received and expended in connection with its operation of the Amphitheatre (R. 77). This statement was also to include a listing of all entertainment produced under its auspices during the preceding season, the admission fees charged, the number of persons attending, and such

other information as would help the City in determining whether the operation of the Amphitheatre had "in fact contributed materially to the use and enjoyment of the park system by the public" (R.77).

The City retained the care, management, and custody of the Amphitheatre and all its equipment and appurtenances (R. 78). No new structure could be erected, no work begun to replace, maintain or repair equipment, appurtenances or physical property connected with the Amphitheatre except on the joint decision of the City and respondent (R. 76).

The City agreed to furnish water (R.76) and to provide roads, paths and parking areas necessary to accommodate persons desiring to attend entertainment given under respondent's auspices (R. 77). The City reserved the right to make and enforce reasonable rules and regulations, to insure good order, to prohibit any entertainment indecent, immoral or calculated to create racial or religious antagonism or to disturb the public peace (R. 79).

The City retained the right to authorize the use of the Amphitheatre for any purpose not inconsistent with rights conferred upon respondent (R. 78). However, the City agreed not to permit any other party to use the Amphitheatre between May 1 and September 30 for the purpose of presenting entertainment at which an admission fee is charged or from which monetary profit is expected unless such party first sought to sublease the Amphitheatre from respondent and the latter arbitrarily refused (R. 78). Finally, the City retained the right to unilaterally terminate the agreement if it deemed it not in the best interest of the public (R. 79).

On September 30, 1951, after the filing of the trial court's memorandum opinion but before entry of judgment, the agreement then in effect between the City and

respondent expired. A new agreement was entered which is set forth in Appendix A. While this agreement was for the year 1952, it has now been renewed for the year 1953. This agreement for the first time sets forth the City's desire to have "similar organizations use the facilities of Iroquois Amphitheatre." Respondent is granted the exclusive right to use the Amphitheatre between June 14 and August 23. The City expressly agrees that it will not give permission to any other party to use the Amphitheatre during the above period without first obtaining the written consent of respondent. Moreover, this agreement, unlike its predecessors, does not reserve to the City the right to overrule an arbitrary refusal to sublease on the part of respondent. Further, the present lease requires the payment by respondent of a rental fee of $1000. In most other respects, the present agreement is the same as the prior agreements.

Specifications of Error

The court erred:

1. In refusing to hold that respondent was operating for and on behalf of the Department of Parks and Recreation of the City of Louisville.

2. In refusing to hold that respondent, as lessee of the City of Louisville, was subject to the same limitations and restrictions as the City itself with respect to its power to deny admission or exclude persons solely on the basis of race and color.

3. In refusing to hold that petitioner had been denied the equal protection of the laws by respondent's refusal to admit him to a city owned structure located in a public park.

Reasons For Allowance of the Writ

1. This case seriously affects the right of Negro citizens to enjoy the benefits of publicly-owned recreational facilities.

Public recreation has come to play an important role in 20th century America.[1] Recognition of the importance of recreation to the maintenance of strong democratic institutions has come only within the past thirty to forty years.[2] It is now understood that effective recreational outlets are essential to the proper functioning of many of the important aspects of modern living. Appropriate recreation is now considered an essential factor in the development of sound mental and physical health,[3] a necessary aid to the building of good morale in the armed services,[4] and an effective preventive to juvenile delinquency.[5]

The public has now accepted the notion that recreation is properly a governmental function [6] since only if the state assumes some obligation in this field can there be any assurance that needed recreational facilities will be available to the large mass of our population.[7] A recent survey lists

---

[1] See Recreation, *Encyclopedia of Social Sciences* 176 (1934); Dulles, *America Learns to Play* (1940); Steiner, *Americans at Play* (1933).

[2] Neumeyer, *Leisure and Recreation* 1-72 (1936). For a statistical survey, see National Recreation Association, *Recreation and Park Year Book* (Mid-century edition 1951).

[3] Gardner, Recreation's Part in Mental Health, 45 *Recreation* 446 (1952); Slavson, *Recreation and the Total Personality*, Ch. 1-2 (1946).

[4] The Thirty-third National Recreation Congress—in Review, 45 *Recreation* 370 (1951).

[5] Rogers, *The Child at Play* 34-36, 192 (1932).

[6] Hjelte, *The Administration of Public Recreation* 24 (1940).

[7] Institute for Training in Municipal Administration, *Municipal Recreation Administration* 30 (1945).

36 different types of recreational facilities commonly operated by municipalities.[8] There are alone 217 publicly-owned outdoor theatres and 504 publicly-owned stadiums reported.[9]

With the increase in governmental operations in this area, securing equal recreational opportunities for Negroes without discrimination on account of race or color, as in other phases of governmental activity, has become a problem which courts have been called upon to resolve.[10] Courts have had little difficulty in bringing recreational facilities within the reach of the Fourteenth Amendment where they have been operated exclusively and openly by the state.[11] Confusion as to the application of constitutional principles, however, has arisen where the public recreational facility was operated pursuant to an agreement between the state and a private agency, e.g., the leasing arrangement in the

---

[8] National Recreation Association, *Recreation and Park Year Book* (Mid-century edition, 1951).

[9] *Ibid.*

[10] See *Rice* v. *Arnold*, 340 U. S. 848, vacating 45 So. 2d 195 (Fla. 1950), reaffirmed 54 So. 2d 114 (Fla. 1951), cert. denied 342 U. S. 896; *Beal* v. *Holcombe*, 193 F. 2d 384 (C. A. 5th 1951); *Boyer* v. *Garrett*, 183 F. 2d 582 (C. A. 4th 1950), cert. denied 340 U. S. 912; *Harris* v. *City of Daytona Beach*, 105 F. Supp. 572 (S. D. Fla. 1952); *Camp* v. *Recreation Board for the District of Columbia*, 104 F. Supp. 10 (D. C. 1952); *Williams* v. *Kansas City*, 104 F. Supp. 848 (W. D. Mo. 1952), appeal pending; *Draper* v. *City of St. Louis*, 92 F. Supp. 546 (E. D. Mo. 1950), appeal dismissed 186 F. 2d 307 (C. A. 8th, 1950); *Law* v. *Mayor and City Council of Baltimore*, 78 F. Supp. 346 (Md. 1948); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S. D. W. Va. 1948); *Lopez* v. *Seccombe*, 71 F. Supp. 769 (S. D. Cal. 1944); *Kern* v. *City Commissioners*, 151 Kan. 565, 100 P. 2d 709 (1940); *Durkee* v. *Murphy*, 181 Md. 259, 29 A. 2d 253 (1942); *Culver* v. *City of Warren*, 84 Ohio App. 373, 83 N. E. 2d 82 (1948).

[11] See *Law* v. *Mayor and City Council of Baltimore, supra; Beal* v. *Holcombe, supra.*

instant case. The arrangement here involved is not an isolated or singular case but a common feature in this field. A 1939 survey revealed that 128 governmental agencies reported that they had leased certain facilities on a commercial basis.[12] Thirty out of 156 such agencies reporting leased one or more facilities to a private club or association on a non-commercial basis.[13]

The decision of the Court of Appeals will thus have ramifications far beyond the narrow facts of the instant case. In the light of this case the constitutional right of Negroes and other minority groups to receive the services of all presently leased municipal recreational facilities without discrimination becomes questionable. If the view of the court below is correct, Negroes may now be effectively excluded from given public recreational facilities by a simple leasing device. Indeed, the same stratagem can be used not only in the case of recreational facilities, but with respect to all types of governmental property.[14]

It is vital for this Court to grant certiorari in this case in order to determine the extent to which the operation of a public recreational facility under a leasing arrangement with a private organization is subject to constitutional limitations. Only in this way can Negro citizens be assured of protection in obtaining the benefits of public recreational facilities on the basis of equality required by the Fourteenth Amendment.

---

[12] National Park Service, U. S. Dept. of Interior, *Fees and Charges for Public Recreation*, 20-21, 29 (1939).

[13] *Ibid.*

[14] Compare *Nash* v. *Air Terminal Services*, 85 F. Supp. 545 (E. D. Va. 1949), with *Norris* v. *Mayor & City Council of Baltimore*, 78 F. Supp. 451 (Md. 1948).

2. Whether the respondent's operations in this case constitute state action presents a substantial federal question which should be independently determined by this Court.

The stipulations of fact and the terms of the leasing agreements which provide the predicate of the decision in this case establish a picture of state ownership and control. The Department of Public Parks conceived of the construction of Iroquois Amphitheatre as a means of increasing the use and enjoyment of its public park system (R. 62-63). It was able to secure all but $5,000 of the necessary funds from the United States Works Progress Administration (R. 63). Respondent, which was organized to enable the general public to enjoy musical and dramatic entertainment, agreed to assist the City in procuring the necessary $5,000 to construct the Amphitheatre and undertook to present entertainment at the Amphitheatre. Thus, from the very inception of this relationship respondent acted as the chosen instrument of the City.

Under the lease in force when this cause arose respondent had exclusive use of the Amphitheatre from May 1-September 30 (R. 18, 74-75)—the entire period of its usefulness for open air presentation. Respondent paid no rent, and was required to pay all net profits over to the City (R. 78). It had but a qualified right to set admission prices (R. 75-76). Moreover, just as any other self-sustaining governmental agency, respondent was required to submit an annual report of its operations, including an audited financial statement (R. 77), and to conduct its activities for the benefit of the public (R. 75, 76, 77).

The City, on its part, retained the care, management and custody of the structure. Yet the City could make no repairs or replacements of any structure or equipment except upon the joint decision of both parties (R. 76) and retained only a qualified right to sublease (R. 78). Finally, the City re-

served the right to unilaterally terminate the agreement (R. 79).

These factors, we submit, show clearly that respondent was acting for and under the supervision and control of the Department of Public Parks. Indeed, respondent here was merely aiding the City in accomplishing one of its objectives.

The present lease requires the respondent to pay a modest rental fee of $1000,[15] and does not require the submission of an annual financial statement.

Respondent is granted exclusive use for a somewhat shorter season (June 14 through August 23),[16] but the dates pre-empted are those most favorable for presentation of outdoor cultural entertainment. Furthermore, this is the traditional outdoor musical season.[17]

The City can now sublease to others only with respondent's written consent. It may no longer overrule respondent's arbitrary refusal to sublet. The duty to keep and maintain the structure in good repair is placed upon respondent. Other than style, the current agreement is identical in all major respects with the one detailed above.

---

[15] Payment of rental is not a crucial indication of private action. See *Culver* v. *City of Warren, supra,* note 10; *Kern* v. *City Commissioners, supra,* note 10.

[16] This merely conforms more realistically to the period when respondent actually presented productions in the outdoor theatre in previous years (R. 19): July 1-August 10, inclusive, 1947; July 5-August 14, inclusive, 1948; July 11-August 21, inclusive, 1949; July 10-August 6, inclusive, 1950 and July 6-August 19, inclusive, 1951. These dates do not include periods when respondent used the premises for rehearsals, etc.

[17] Hewitt, A Backward Glance at '49, 35 *Equity* 11 (April, 1950); Hewitt, The Survey of Summer Stock, 34 *Equity* 13 (April, 1949).

Thus, in our view, under the present agreement respondent remains an instrument of the state in its operation of the Iroquois Amphitheatre. The words of the court in *Lawrence* v. *Hancock*, 76 F. Supp. 1004, 1008 (S. D. W. Va. 1948), seem particularly appropriate to describe this relationship:

> "Justice would be blind indeed if she failed to detect the real purpose in this effort of the City * * * to clothe a public function with the mantle of private responsibility. 'The voice is Jacob's voice,' even though 'the hands are the hands of Esau.' It is clearly but another in the long series of stratagems which governing bodies of many white communities have employed in attempting to deprive the Negro of his constitutional birthright; the equal protection of the laws."

Moreover, it is equally clear under Kentucky law that the City is required to control the operation of the Amphitheatre. This duty is imposed upon the Director of the Department of Parks and Recreation and cannot be delegated. *Park Commissioners of Ashland* v. *Shanklin*, 304 Ky. 43, 199 S. W. 2d 721 (1947). In *Board of Park Commissioners* v. *Speed*, 215 Ky. 319, 285 S. W. 212 (1926), the court enjoined the Board of Park Commissioners of Louisville from entering into a contract with the Louisville Memorial Commission whereby the latter was to be given the power to erect and manage an auditorium on public park property. In so holding, the Court declared at page 333:

> "If an auditorium is to be erected and maintained upon park property, it must be under the control of the park board since the board has been designated by law, and its members elected by popular choice, to manage and control that property."

More recently, in the *Shanklin* case, the Court of Appeals of Kentucky reiterated this view in saying at page 47:

> "It seems to us that the proposed contracts would in effect give to the various clubs the right and power to exclude the general public from the use of a substantial part of the park for an indefinite although substantial period of time. This would be consistent with its free public use. The Board would surrender its sole and exclusive control of the management of this part of the public property. Its dominion and administration would be less than absolute."

The decisions here is at war with these state authorities. Since under Kentucky law, respondent can only act for and through the Department of Public Parks, its action in the instant case is bound by the requirements of the Fourteenth Amendment.

In holding to the contrary, the court below committed fundamental error. Determination as to whether respondent's action is private or state in character presents a substantial federal question which this Court should determine for itself. *Nixon* v. *Condon*, 286 U. S. 73, 88-89. For these reasons, we respectfully submit, this petition should be granted.

3. Decisions among state and lower federal courts with respect to the status of leasing arrangements between municipalities and private organizations are in conflict and should be resolved.

The central constitutional problem here presented is to distinguish private action from public action. The Fourteenth Amendment has foreclosed, at least as a constitutional issue, discriminatory action by public authority. The difficulty in thinking of any private rights independent

of recognition and protection by government indicates that "public" and "private" are not separate compartments but titles for opposing ends of a continuous spectrum.[18] This Court has already faced the problem of isolating unconstitutional public discrimination in the primary cases, *Terry* v. *Adams*, — U. S. —, 21 U. S. L. Week 4346 (May 4, 1953); *Smith* v. *Allwright*, 321 U. S. 649; *United States* v. *Classic*, 313 U. S. 299; *Nixon* v. *Condon*, 286 U. S. 73; *Grovey* v. *Townsend*, 295 U. S. 45; *Nixon* v. *Herndon*, 263 U. S. 536; see *Rice* v. *Elmore*, 165 F. 2d 387 (C. A. 4th 1947), cert. denied 333 U. S. 875; the restrictive covenant cases, *Shelley* v. *Kraemer*, 334 U. S. 1; and the railway labor cases, *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Fireman*, 323 U. S. 210. The Fourth Circuit was also faced with the same problem in *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (C. A. 4th 1945), cert. denied 326 U. S. 721. In petitioner's opinion, the court below in the instant case has misconceived the thrust of these decisions and thus ignores the pith of the matter here involved.

In the absence of a definitive decision by this Court, considerable confusion exists among lower federal and state appellate courts as to where to draw the line between "public" and "private" action where a public agency owns and a private organization operates a recreational facility pursuant to a leasing arrangement. Compare *Lawrence* v. *Hancock, supra*, with the instant case; *Culver* v. *City of Warren*, 84 Ohio App. 373, 83 N. E. 2d 82 (1948), and *Kern* v. *City Commissioners*, 151 Kans. 565, 100 P. 2d 709 (1940) with *Harris* v. *City of St. Louis*, 233 Mo. App. 911, 111 S. W. 2d 995 (1938) and *Modern Amusements, Inc.* v. *New Orleans Public Service*, 183 La. 848, 165 So. 137 (1935).

---

[18] Barnett, What is State Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?, 24 *Ore L. Rev.* 227, 229-30 (1945).

Since doctrinally the discriminatory action has to be that of the state in order to bring the broad constitutional prohibition into play, the question which arises here is what circumstances are to be deemed sufficient to give rise to state action. In *Lawrence* v. *Hancock, supra,* there was involved a lease of a city owned and constructed swimming pool to a private corporation which paid no rent, received no profits and had to maintain the facility. The court held that the lessee's exclusion of Negroes was unconstitutional state action. The *Kern* and *Culver* cases, *supra,* also involving publicly-owned swimming pools, both held that the leasing arrangement did not divest the facilities of their public characteristics. In the former case, the lease established the hours when the pool was to be operated, set the admissions charges, and required the lessee to pay an annual rental of $1,000. In the latter case, the contract required the City to maintain the pool and the lessee to pay over 10% of the gross profits as rent.

Contrary holdings, however, resulted in the *Harris* and *Modern Amusements* cases, *supra.* In the *Harris* case, a municipal auditorium and community center was leased to various private groups. Negroes, however, were restricted to a segregated section in the balcony by one private lessor who almost exclusively pre-empted the use of the auditorium for a series of musical and dramatic presentations. The City reserved the right of revocation, control, management, and the power to establish charges and enforce all necessary rules for the operation of the facility. The court held that the City had a legal right to let the facility and permit the lessee to regulate the admission policy because the City, in such instance, acts not in its governmental capacity but rather in a quasi-private capacity free of constitutional limitations.

The *Modern Amusements* case developed out of a lease of a city-owned stadium to a private corporation under an agreement whereby the lessee covenanted not to operate it

in an objectionable or offensive manner. When the City terminated the lease after the lessee permitted a game between Negro teams to be played on the premises and the lessee sought to recover for breach of the lease on the ground that the City's action constituted unconstitutional racial discrimination, the court ruled that the agreement was a private contract to which the Fourteenth Amendment did not extend.

In the instant case, the decisions below were bottomed on the *Harris* case, *supra*. While cognizance was apparently taken of the indicia of state action surrounding the construction of the Amphitheatre and reserved in the leasing contracts, crucial weight was placed upon the fact that respondent is a private association which assumed all financial risks arising incidental to its use of the facility. Thus, the court held that respondent was not a governmental agency and could discriminate against petitioner without constitutional restriction.

In sum, the courts which have regarded leasing agreements as mere private contracts entered into by city governments in their quasi-proprietary capacity have upheld the racial discriminatory policies and practices of private lessees. On the other hand, those courts which have stressed the public dedication of the leased premises, the vestiture of ownership, and the various indicia of governmental control retained in the agreement, have viewed lessees as governmental instrumentalities managing the leased premises under a contract entered into by municipalities in their trusteeship capacity. Therefore, petitioner urges this Court to grant certiorari in order to resolve this conflict and set appropriate standards by which lower courts should be guided in this area.

4. The decision below is in conflict with principles established in decisions of this Court, particularly *Nixon* v. *Herndon.*

While petitioner was refused admission to Iroquois Amphitheater by respondent because of his race and color (R. 19), respondent in fact did not have the power to freely determine its own admission policy. The Amphitheatre is located in a park which the Department of Parks and Recreation has set aside for the exclusive use of white persons (R. 44). The authority of the City to promulgate rules and regulations assigning certain parks exclusively to Negroes and others to white persons was sustained by the Court of Appeals of Kentucky in *Warley* v. *Board of Park Commissioners,* 233 Ky. 688, 26 S. W. 2d 554 (1930). It is admitted that Negroes were denied admission to parks set aside for the exclusive use of white citizens solely on account of their race (R. 43). To view respondent's action, therefore, as the independent action of a private person, as did the court below, is to distort facts.

Petitioner was in truth denied admission to the Iroquois Amphitheatre pursuant to state regulations and in conformity to state law. Under the City's rules only white persons were entitled to use Iroquois Park. Thus petitioner, in going into the Park in his attempt to attend the performance at the Amphitheatre, actually violated the City's regulations. In the absence of state law, respondent had no authority or power to refuse admission to any law-abiding citizen who tendered the requisite admission fee. See *Park Commissioners of Ashland* v. *Shanklin, supra; Board of Park Commissioners* v. *Speed, supra.*

Indeed, it would seem clear that had respondent arbitrarily refused admission to a white person, it would have breached the agreement between it and the City, for the entire purpose of the agreement as expressed therein is to

bring about an increased use of Iroquois Park by making entertainment at the Amphitheatre available to the public at low cost (R. 75, 76, 77). An affirmative duty is thus placed on respondent to admit all white members of the public. And it is only by virtue of the City's regulations and state court decisions upholding the City's right to maintain segregated parks that respondent had the authority to deny petitioner admission to the Amphitheatre. *Cf. Public Utilities Commission of the District of Columbia* v. *Pollack,* 343 U. S. 451.

Since respondent here was in fact enforcing state law, it was the state's regulations which prevented petitioner's admission. To this extent respondent was acting for the state and under color of state law, and its action is therefore subject to the restraints of the Fourteenth Amendment under principles enunciated by this Court in *Nixon* v. *Herndon, supra.* See also *Nash* v. *Air Terminal Services, supra.*

The Fourteenth Amendment imposes a duty on the City to make public park property available to all persons without discrimination based upon race and color. Since the Amphitheatre was a unique piece of public property, exclusion therefrom of Negroes pursuant to state authority was clearly an unconstitutional act. See *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Board of Regents,* 332 U. S. 631; *Sweatt* v. *Painter,* 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637.

It is clear that the Department of Public Parks could not present entertainment at the Amphitheatre under its exclusive auspices and deny petitioner's admission. Nor, we submit, can the requirements of the 14th Amendment be avoided by leasing the site to respondent subject to City regulations limiting use of the park to white persons.

The decision of the court below in holding respondent's action to be private action free of constitutional limitations

is in fatal conflict with principles settled by this Court in *Nixon* v. *Herndon, supra.* We respectfully submit that this Court grant this petition in order that this conflict be resolved.

5. The decision in this case is in conflict with the principles enunciated by this Court in *Nixon* v. *Condon, Smith* v. *Allright* and *Terry* v. *Adams* with respect to the delegation of state authority.

Under applicable Kentucky statutes, the title to Iroquois Amphitheatre is held by the City, "in strict and inviolable trust" for public park purposes.[19] The Department of Public Parks and Recreation is entrusted with the care, management, and custody of all park grounds used for park purposes.[20] *Board of Park Commissioners of Ashland* v. *Shanklin, supra; Board of Park Commissioners* v. *Speed, supra.*

The record reveals that the City here looked upon the arrangement not as a lease of property held in its quasi-proprietary capacity, cf. *Harris* v. *City of St. Louis, supra,* but as a method of carrying out its statutory duty to manage the City parks for the public good. The agreements between the City and respondent highlight this intention. The first agreement of lease, entered into just prior to the construction of the Amphitheatre, recites that the Park Board of the City of Louisville is of the opinion that "the construction of an outdoor amphitheatre, suitable for the production of musical, dramatic, operatic, and other forms of entertainment, out-of-doors, in Iroquois Park, would greatly increase the recreational facilities available to the

---

[19] Ky. Rev. Stat., § 97.252 (1948). See Appendix B. *Cf. Hague* v. *Congress of Industrial Organization,* 307 U. S. 496, 514.

[20] Ky. Rev. Stat. § 97.290 (Baldwin's certified ed., 1942) as incorporated into Ky. Rev. Stat., § 97.250 (1948). See Appendix B.

public in said Park, and the use and enjoyment of said Park by the Public * * *" (R. 62-63). All agreements require that admission fees and charges be reasonable so as to "increase the use of Iroquois Park by making the entertainment presented at said Amphitheatre available to the public at low cost" (R. 66, 75-76, App. B). These provisions thus manifest the intention of the City to transfer to respondent the performance of a governmental function.

In *Nixon* v. *Condon, Smith* v. *Allright* and *Terry* v. *Adams,* this Court was faced with instances of delegation of a governmental function fundamentally similar to that in the instant case. In *Nixon* v. *Condon,* a state statute granted to the executive committee of each political party the power to prescribe the qualifications of its members. This Court held that the refusal of the election judges to permit petitioner to vote in a primary election was violative of his rights under the Fourteenth Amendment, because "[d]elegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black." at page 89. A strict principal-agency test in the determination of state action was there expressly rejected.

While the delegation of state authority in *Smith* v. *Allright* was not as clear-cut, this Court found such delegation in "the duties imposed upon [the party] by state statutes." More recently, in *Terry* v. *Adams* where the picture was even more blurred,[21] again this Court found state action. Mr. Justice Clark, concurring, speaking for three other members of this Court, expressed the guiding principle succinctly in these words:

> "Accordingly, when a state structures its electoral apparatus in a form which devolves upon a

[21] See *Rice* v. *Elmore, supra; Baskin* v. *Brown,* 174 F. 2d 391 (C. A. 4th 1949).

> political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play." — U. S. —, 21 U. S. L. Week at 4351.

The principal-agency test for determining state action was again repudiated, Mr. Justice Black stating:

> "It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage." — U. S. —, 21 U. S. L. Week at 4349.

The decisions in the above cases are of course limited to the field of primary elections. But the general principles involved cannot be so narrowly restricted, for the philosophy of state action upon which these decisions rest is an all-pervasive one. If the state allows the performance of a governmental function to devolve upon a private organization, that organization assumes those attributes of government which bring the constitutional safeguards into play.

Indeed, state and lower federal courts have almost invariably held that the principles underlying *Nixon* v. *Condon* and *Smith* v. *Allright* are ones of general validity and thus applicable to other areas of governmental activity. *Kerr* v. *Enoch Pratt Free Library, supra* (library); *Nash* v. *Air Terminal Services, supra* (restaurant); *Lawrence* v. *Hancock, supra; Kern* v. *City Commissioners, supra; Culver* v. *City of Warren, supra* (swimming pool). See *Dorsey* v. *Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541 (1949), cert. denied 339 U. S. 981.[22] But *cf. Harris* v. *City*

[22] The New York Court of Appeals there stated, at page 532:
"In a more recent series of cases, the federal courts have held private groups subject to the constitutional restraints when they perform functions of a governmental character in matters of great public interest."

of St. Louis, supra; Modern Amusements Inc. v. *New Orleans Public Service, supra.*

In the *Kerr* case, the Court of Appeals for the Fourth Circuit, expressly refusing to be guided by technical principles of principal and agent, gave forceful recognition to the proposition that the principles of *Nixon* v. *Condon* and *Smith* v. *Allright* are applicable to any grant of state power to a private organization for the performance of a state function.

While the *Nash* case involves federal action rather than state action, it is particularly illuminating. The defendant there operated restaurants at Washington National Airport as a concessionaire of the United States Government. In holding that defendant was under a constitutional duty to serve all persons without discrimination on account of race or color, the court based its decision solely on the fact that defendant had been granted authority to perform a governmental function. The heart of the court's decision is stated in these words at page 549:

> "In effect, the concessionaire here is conducting the facility in the place and stead of the Federal government. To conclude otherwise would overlook not only the status and purpose of the airport, but also the purpose of the concession. It is to provide food and refreshment to the public in travel and to complement the facilities offered by the United States Government in support of air transportation * * * we * * * hold its restaurants are too close, in origin and purpose, to the functions of the public government to allow them the right to refuse service without good cause."

The decision in the instant case departs from the generally prevailing view. The basic conflict between the decision below and the above cases makes this case one pecu-

liarly appropriate for review by this Court. In deciding that the acts of respondent did not constitute state action, the court below, in effect, reverted to traditional principles of agency law as the single standard—a test rejected by this Court in the primary election cases and generally abandoned by other courts in other areas of governmental activity.

The factual differences between the primary election cases and the instant one should not be allowed to blur the fundamental oneness of the problems involved. Of course, there is hardly any duty on a municipality to acquire land for park purposes or to invest public funds in the construction of a public amphitheatre thereon. Nevertheless, once the City of Louisville here acquired Iroquois Park and constructed the Amphitheatre, there developed upon the Director of Parks and Recreation the statutory duty to manage the Amphitheatre for public park purposes. Thus, the delegation of governmental authority here is of the same nature as that in *Nixon* v. *Condon*, *Smith* v. *Allright*, and *Terry* v. *Adams*.

It is respectfully submitted that this Court grant this petition in order to resolve the conflict between the decision below and the principles enunciated by this Court in the primary election cases.

6. The decision of the Court below conflicts with well-settled doctrine of this Court that rights guaranteed under the 14th Amendment are personal and present.

The district court placed considerable emphasis upon the fact that neither petitioner nor any organization to which he belonged had sought to secure possession of the Amphitheatre for the purpose of providing entertainment procured and paid for by them without expense to the City. What the court was in effect stating is that if a sufficient number of Negroes were interested in supporting the pro-

duction of musical entertainment, then the City would be obliged to allow them to use the Amphitheatre when it wasn't being used by respondent. Thus it conditions petitioners' right to enjoy the recreational benefits available to white persons at the Iriquois Amphitheatre on what may or may not be done by other members of petitioner's racial group.

This Court has often reiterated that rights secured under the 14th Amendment are personal and present and cannot be made dependent on what course of action other persons may take. See *Sweatt* v. *Painter*, 339, U. S. 629; *Shelley* v. *Kraemer*, 334 U. S. 1; *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151. In basing its decision on the fact that there had been no showing that any Negro group or organization had applied for permission to use the Amphitheatre and had been refused, the court below applied principles in basic conflict with a well-settled constitutional doctrine of this Court and committed fatal error.

CONCLUSION

WHEREFORE, for the reasons hereinabove stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. CARTER,
THURGOOD MARSHALL,
BENJAMIN F. SHOBE,
Counsel for Petitioner.

ELWOOD H. CHISOLM,
DAVID E. PINSKY,
of Counsel.

Dated: May 20, 1953.

APPENDIX A

Agreement

This AGREEMENT made and entered into this 5th day of February, 1952, by and between the Department of Parks and Recreation of the City of Louisville, Kentucky by its Director, T. Byrne Morgan (hereinafter called the Department), and Louisville Park Theatrical Association (hereinafter called The Association), a corporation having no capital stock and from whose operations no private pecuniary profit is derived,

Witnesseth That

WHEREAS, the purpose of the Association is to present musical and theatrical entertainment in the City of Louisville at low cost and,

WHEREAS, The Department owns a structure, located in Iroquois Park, known as Iroquois Amphitheatre which has facilities suitable for use in presenting musical and theatrical entertainment, and

WHEREAS, The Association is desirous of using such facilities for the presentation of its musical and theatrical entertainments and The Department is desirous of having The Association and other similar organizations use the facilities of Iroquois Amphitheatre,

NOW, THEREFORE, in consideration of the premises and of the covenants and agreements hereinafter set out, the said parties do hereby covenant and agree as follows:

1. The Department in consideration of the agreements and covenants of the Association as hereinafter set out, does hereby give and grant to the Association the exclusive

right and privilege to use said Iroquois Amphitheatre, together with the equipment, buildings and land appurtenant thereto, on such dates between June 14, 1952, and August 23, 1952, as The Association may, by written notice to the Department, designate; and agrees that it will not lease, or give to any other person, firm or corporation the right to use said Amphitheatre during said period, without having first obtained the written consent of The Association thereto.

2. The Association shall have the right to use the Amphitheatre on any, or all, of said dates, for the purposes of rehearsing, and/or presenting, such musical, dramatic, operatic, and other forms of entertainment, both amateur and professional, as it may select; for the sale and service on such occasions of such food, soft drinks, tobacco, cigars, cigarettes, candy, programs, musical scores, etc., as are customarily sold or offered for sale in similar places of public entertainment and for the rendition of such other services as are customarily rendered in such places, and for no other purpose.

The Association shall have the right to produce the entertainment, sell and serve the items, and render the services aforesaid, itself, or to contract with any other person, firm, or corporation, for the production of said entertainments, the sale and service of said items, and the rendition of said services or any of them.

3. The Association, or any person, firm or corporation with whom The Association has contracted for the production of any entertainment at said Amphitheatre, shall have the right to charge any person seeking to attend said entertainment such admission fee as may be fixed by the Board of Directors of the Association. Likewise, The Association, or any person, firm or corporation with whom it has contracted to furnish food, soft drinks, programs,

musical scores, etc., or to render said services as are customarily rendered in connection with such entertainment, shall have the right to charge such prices as may be approved by the Board of Directors of The Association. Provided, however, that such admission fees and charges shall be reasonable and consistent with the desire of both parties thereto to increase the use of Iroquois Amphitheatre by making the entertainment presented at said Amphitheatre available at low cost.

4. The Association agrees that it will not erect, or maintain, any signs or advertisements, in, upon, or about the Amphitheatre, except only such signs or advertisements, as may with the approval of the Department be placed thereon to advertise attractions to be presented at said Amphitheatre, and as are contained in programs distributed at any performance given in said Amphitheatre, and agrees that the Department may remove, or obliterate, any sign, or advertisement, erected or maintained by the Association in violation of the Agreement.

5. The Department agrees that:

(a) It will turn over said Amphitheatre to The Association, on June 14, 1952, in good order and repair and in suitable condition for use by The Association;

(b) Furnish all water necessary to enable The Association, or any person, firm or corporation with whom The Association may have contracted, to produce the entertainment contemplated by this Agreement. The Association is to pay all other utility bills during the period of its use (June 14, 1952 to and including August 23, 1952) of said Amphitheatre.

6. The Association agrees to pay to the Department on or before August 23, 1952, the sum of One Thousand ($1,000.00) Dollars for the rights and privileges granted

to it by this Agreement in connection with the use of said Amphitheatre, to re-imburse the Department for additional expenses occasioned by this use.

7. The Association agrees that during the period of its use of said Amphitheatre it will keep said premises in good order and repair and at the expiration of its term of use will return said premises to the Department in as good condition as reasonable and careful use will permit.

8. The Association shall have the exclusive right to select, and agrees to assume full responsibility for employing, fixing and the compensation of, and paying the salaries and wages of, all artists, actors, musicians, ticket takers, ushers, stage hands, and persons other than police, employed in connection with the presentation of any entertainment produced by, or under the auspices of, The Association at said Amphitheatre.

9. The Association agrees that The Department shall at all times have the right to make and enforce such reasonable rules and regulations as it deems necessary for the preservation of said Amphitheatre and the equipment and appurtenances thereto belonging, and for the preservation of good order therein, and shall have the right to prohibit the production at said Amphitheatre of any entertainment which is, in the opinion of The Department or any other department, indecent or immoral or calculated to create or incite racial or religious antagonism or disturbance of the public peace.

10. It is further mutually understood and agreed by and between the parties hereto that The Association shall have the right, at its option, to renew this Agreement on the same terms and conditions and for the same or similar period of time for the use of said Amphitheatre for the

Summer season of 1953. The Association must notify, in writing, The Department of its election to renew the said Agreement on or before October 1, 1952.

IN TESTIMONY WHEREOF, the parties have caused their corporate names to be subscribed and their corporate seals to be affixed hereto, The Department of Parks and Recreation, by its Director, and the Louisville Park Theatrical Association by its President, all at Louisville, Kentucky, the day and year first above mentioned.

THE CITY OF LOUISVILLE

By T. Byrne Morgan
Director of Parks and Recreation

LOUISVILLE PARK THEATRICAL ASSOCIATION

By: G. E. Gans

(Seal of City of Louisville)

Approved
Charles P. Farnsley
Mayor

I, Wm. D. Meyers, Director of Finance of the City of Louisville, Kentucky, and by virtue of Kentucky Revised Statutes Section 91.060, custodian of ordinances and records of the City of Louisville do hereby certify that the foregoing is a full and true copy of an agreement of the City of Louisville entered into the 5th day of February, 1952.

Wm. D. Myers

APPENDIX B

Statutes of Kentucky

Applicable to Parks in Cities of the First-Class

KENTUCKY REVISED STATUTES (1948)

97.250 [2840; 2841; 2844; 2847] **Powers of department of public parks and recreation in first-class cities; employes; director of parks and recreation.** (1) The department of public parks and recreation of any city of the first class shall, from and after the effective date of KRS 97.250 to 97.258, be vested with and exercise all of the powers and perform all of the functions and duties of any then existing board of park commissioners of such city, except as may be otherwise provided by law or by KRS 97.250 to 97.258. From and after said date any such board of park commissioners of such city shall cease to exist. The agents and employes of said department of public parks and recreation, except as provided herein, shall be employed and governed in accordance with the merit system, as provided by any law or laws, or amendments thereof, and any rules and regulations issued pursuant thereto, authorizing, creating and governing any city board or commission empowered to administer and enforce civil service laws, rules and regulations in and for such city.

(2) *The department of public parks and recreation of any city of the first class shall be under the supervision and direction of a director to be designated director of parks and recreation, and shall have exclusive direction, supervision and control of all park property, as herein defined,* except as otherwise provided by law or by KRS 97.250 to 97.258 or by ordinance of the legislative body of said city; and shall provide for and supervise all public amusements and recreation in parks, playgrounds, and community cen-

ters. The director of said department shall have power to adopt rules and regulations for the reasonable and proper use, management and control of public park, playground and community center property, and may organize the said department for administrative purposes into such divisions as may be necessary for the proper conduct of the business of said department, and appoint heads or chiefs of such divisions, who, under the supervision and control of said director, shall have the direction of such divisions. (1942, c. 34, § 2) [Emphasis supplied.]

97.251 Definition of "park property." The term "park property" includes all parks, squares and areas of land owned or used by said city for park purposes, and all buildings, structures, improvements, seats, benches, fountains, walks, drives, roads, trees, plants, herbage, flowers, and other things thereon, and inclosures of the same; all shade trees on streets or thoroughfares throughout park property and said city; all resting places, watering stations, playgrounds, parade grounds, community centers, or the like; all connecting parkways and roads or drives between parks, and all avenues, roads, ways, drives, walks, with all trees, shrubbery, vines, flowers and ornaments of any description thereon, acquired for park purposes; and all birds, animals or curiosities, or objects of interest or instruction placed in or on any of such inclosures, ways, parkways, roads or places; and said term shall be liberally construed. (1942, c. 34, § 2)

97.252 Title to and control of park property; exemption from taxation; use for streets; contracts for use of aviation fields; control of public ways acquired for park purposes. (1) The title to all property with all improvements and equipment acquired for park, airport or aviation field purposes, owned by the board of park commissioners of a city of the first class at the time KRS 97.250 to 97.258 become effective, is hereby transferred to the city subject to any

existing leases thereof, *and shall be held by the city in strict and inviolable trust for such public purposes,* free from all taxation, imposts or assessments by state, county, district, municipal, or other governmental subdivision; provided, however, that the city may use any portion of such property as may be necessary and proper for the construction, extension, or widening of streets, boulevards, thoroughfares or other public ways, and may enter into contracts or agreements, with reference to properties acquired for airport or aviation field purposes, for the use of such field and airport for aviation purposes, with the United States government or any agency thereof, or any state government or any agency thereof, or any board of aviation established under any Act of the General Assembly of this Commonwealth, or of any other commonwealth or state, or any individual, firm or corporation; provided, however, it shall at no time and in no way enter into any contract or agreement that prevents its carrying out the main purpose of the establishment and maintenance of a public municipal aviation field and airport, for the general use of the citizens of said city as a park purpose. [Emphasis supplied.]

(2) Such park property as consists of all connecting parkways and roads or drives between public parks, and all avenues, roads, ways, drives and walks outside of the boundaries of public parks, which were or are acquired for park purposes, from and after the effective date of KRS 97.250 to 97.258, shall be under the direction, control, maintenance and management of the department of public works of said city. (1942, c. 34, § 2)

Pertinent Prior Statutes

KENTUCKY REVISED STATUTES
(1942 Baldwin's Certified Edition)

97.270 Powers and duties of board of park commissioners in first class cities. (1) The board shall have the care, management and custody of all parks and grounds used for park purposes. . . .

• • •

CARROLL'S KENTUCKY STATUTES ANNOTATED
(Bald. Rev. 1936 ed.)

§ 2840. Board of park commissioners; controlled by.—The public parks in a city of the first class shall be held, managed and controlled by a board under the name and style of the board of park commissioners.

• • •

§ 2848. Powers and duties of commissioners.—The board, constituted as aforesaid, shall have the care, management and custody of all parks and grounds used for park purposes. . . .

• • •

Office - Supreme Court
FILED
JUL 2 1951

24

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	2–5
Argument	5–13
I. Title 28, United States Code, Section 1251(1), Under Which Petitioner Invokes the Jurisdiction of this Court, Relates Solely to the Original and Exclusive Jurisdiction of this Court	5–6
II. The Lease Agreement Upon Which Petitioner Bases His Entire Argument Has Terminated and the Question Involved Based Thereon is Moot	6–8
III. Response to Reasons Assigned by Petitioner for Allowance of the Writ	8–13
Conclusion	13

TABLE OF CASES CITED.

	PAGE
Amalgamated Association of Employees v. Relations Board, 340 U. S. 416	8
Board of Park Commissioners v. Speed, 215 Ky. 319, 285 S. W. 212	9
Culver v. City of Warren, 83 N. E. 2d 82	10
Harris v. City of St. Louis, 111 S. W. 2d 995	10
Kern v. City Commissioners of City of Newton, 151 Kan. 565, 100 P. 2d 709	10
Lawrence v. Hancock, 76 F. Supp. 1004, 1009	10
Modern Amusements, Inc., v. New Orleans Public Service, 165 So. 137	10
Park Commissioners of Ashland v. Shanklin, 304 Ky. 43, 199 S. W. 2d 721	9
Shelley v. Kraemer, 334 U. S. 1, 13	11
St. Pierre v. United States, 319 U. S. 41	8
United States v. Alaska S. S. Co., 253 U. S. 113	8
United States v. Hamburg-American Co., 239 U. S. 466	8

IN THE

Supreme Court of the United States

October Term, 1953.

No. 85

JAMES W. MUIR, - - - - - *Petitioner,*

v.

LOUISVILLE PARK THEATRICAL ASSOCIATION, - - - - - *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (R. 20-35) is reported at 102 F. Supp. 525. The opinion of the Court of Appeals for the Sixth Circuit is reported at 202 F. 2d 275.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 20, 1953 (R. 83). The petition for a writ of certiorari was filed on May 21, 1953. The jurisdiction of this Court is invoked by petitioner under Title 28, United States Code, Section 1251(1), (Petitioner's Brief, p. 1). This section of the United States Code relates solely to the original jurisdiction of this Court, and not to the jurisdiction of this Court to grant writs of certiorari.

QUESTION PRESENTED.

Whether respondent, who leases from the City of Louisville a publicly owned and maintained amphitheatre located in a public park, can refuse petitioner admission to a theatrical production given by it in such amphitheatre on tender of the required admission fee, solely because of petitioner's race and color, without violating his rights to equal protection of the laws within the meaning of the Fourteenth Amendment.

STATEMENT.

The statement of facts by petitioner is substantially correct insofar as it goes. We, therefore, need only summarize the facts and call to the Court's attention certain additional facts.

The petitioner stipulated that:

(a) Louisville Park Theatrical Association is a non-stock, non-profit, private corporation which, entirely at its own expense and under its sole direction and supervision, produces and presents theatrical productions in Louisville, Kentucky;

(b) The Association has presented such productions, both in a City-owned facility and elsewhere in Louisville;

(c) The City of Louisville owns and maintains a structure located in Iroquois Park, known as the Iroquois Amphitheatre;

(d) The Association presented its productions in the Amphitheatre during a limited peroid in the summer months of the years 1947-1951;

(e) The Association's right to use the Amphitheatre during this period was governed by an agreement (R. 74-79) with the City, dated May 14, 1947.

(f) On July 22, 1949, the Association declined to sell him a ticket to one of its theatrical productions then being presented at the amphitheatre, solely because of the fact that he was and is a colored person of Negro blood and African descent (R. 18-19).

The City of Louisville has never denied petitioner or any member of his race the same right to use the Iroquois Amphitheatre as granted to the Association (R. 26).

There is no proof that the Association refused to allow petitioner, or any other Negro citizen, the right to use the Amphitheatre for a similar purpose.

Petitioner filed suit in the District Court, alleging that the Association, in presenting theatrical productions in the Amphitheatre owned by City was "carrying on a public function as agent of * * * the City of Louisville" (R. 12), and sought to compel the Association to admit him to all productions presented at the Amphitheatre.

After a hearing on the merits of the case, the District Court dismissed petitioner's complaint on the grounds that the act complained of was the sole act of the Association, in its capacity as a private corporation, not the act of the City of Louisville or any "arm" of the State and, therefore, not subject to the provisions of the equal protection clause of the Fourteenth Amendment (R. 31, 36). The District Court further held that the City of Louisville does not violate the Fourteenth Amendment in allowing the Association to "use the Iroquois Amphitheatre for private operation for a short period of time * * * where there is no showing that other groups, including any Negro organization, may not be allowed to lease the Amphitheatre under similar terms on a non-discriminatory basis." (R. 37).

In designating the points upon which he would base his appeal to the Court of Appeals for the Sixth Circuit, (R. 80-81), petitioner did not question the correctness of the District Court's ruling that the City of Louisville does not violate the Fourteenth Amendment to the Constitution of the United States in allowing the Association to use the Amphitheatre.

On appeal, the Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court, holding that the Association, "a privately operated enterprise which leased from the City of Louisville an Amphitheatre in Iroquois Park, where the City did not participate either directly or indirectly in the operation of the private enterprise, was guilty of no unlawful discrimination, in violation of the Fourteenth Amendment, in refusing admission to colored persons to its operatic performances * * *" (R. 83).

The three agreements between the Association and the City (R. 62-79) as to the use of the Amphitheatre are no longer in effect, the last of them having expired in September 1951. The agreement set forth in Appendix "A" of petitioner's brief is not a part of the record in this case.

ARGUMENT.

I.

Title 28, United States Code, Section 1251(1), Under Which Petitioner Invokes the Jurisdiction of This Court, Relates Solely to the Original and Exclusive Jurisdiction of This Court.

Title 28, United States Code, Section 1251(1) provides:

> "(a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> (1) All controversies between two or more States;"

This section of the United States Code does not confer jurisdiction on this Court to entertain petitions for, or grant, writs of certiorari.

II.

The Lease Agreement Upon Which Petitioner Bases His Entire Argument Has Terminated and the Question Involved Based Thereon is Moot.

The petitioner has stipulated that Association is a private corporation and that the productions presented by it at the Amphitheatre are created entirely at its own expense and under its sole supervision (R. 18).

The District Court held that the City of Louisville does not violate the Fourteenth Amendment in leasing the Amphitheatre to the Association (R. 37). The petitioner did not question the correctness of this ruling in designating the points upon which he would base his appeal to the Court of Appeals for the Sixth Circuit (R. 80-81). The petitioner has, therefore, voluntarily precluded this Court from any consideration of whether the City of Louisville infringed upon any of his Constitutional rights in making a lease agreement with the Association.

The entire controversy as to whether or not the Association is an "arm of the State" and its acts subject to the restraints of the Fourteenth Amendment is, therefore, dependent upon the terms and provisions of the agreement between the Association and City of Louisville as to the use of the Amphitheatre, which

petitioner contends establishes such relationship. This agreement, dated May 14, 1947, by its own terms and provisions, terminated in September 1951 (R. 75). Two prior agreements which the petitioner tendered in evidence and included in the record (R. 62-74) terminated prior to this suit. Since the agreement, which was in effect at the time of the act complained of, has terminated, the questions of fact or conclusions of law founded on the relationship created by this agreement are now moot.

The petitioner has inserted, as Appendix "A" of his brief (Petitioner's Brief pp. 26-30), a certified copy of a purported agreement between the City and Association, dated February 5, 1952. This purported agreement is not a part of the record in this case. There is no proof in the record that the Association presented theatrical productions at the Amphitheatre during 1952 pursuant to this agreement. There is no proof in the record that the agreement was renewed for the 1953 season. There is no proof in the record that the Association is now giving performances at the Amphitheatre pursuant to said agreement. There is no proof in the record that the Association has refused petitioner admission to the Amphitheatre during any of the time when the purported agreement gave the Association the right to use the Amphitheatre.

It is a well established rule of law that a Federal Court is without power to decide moot questions or to give advisory opinions which cannot affect rights of the litigants in the case before it. *Amalgamated*

Association of Street, Electric Railway & Motor Coach Employees v. *Wisconsin Employment Relations Board,* 340 U. S. 416; *St. Pierre* v. *United States,* 319 U. S. 41; *United States* v. *Alaska S. S. Co.,* 253 U. S. 113; *United States* v. *Hamburg-American Co.,* 239 U. S. 466.

The question here involved, based solely on the agreement between City and Association, is now moot; and the petition for a writ of certiorari should be denied.

III.

Response to Reasons Assigned by Petitioner for Allowance Of the Writ.

1. This case seriously affects the right of Negro citizens to enjoy the benefits of publicly owned recreational facilities.

The public facility here involved is the structure known as the Iroquois Amphitheatre. The decision of the Court of Appeals for the Sixth Circuit (R. 83) in no way impairs the right of Negro citizens to make the same use of this structure as does the Association.

The decision of the Court of Appeals (R. 83) holds that the creation and presentation of a theatrical production by a private corporation, where the City does not participate therein either directly or indirectly, does not constitute State action merely because the production is given on publicly owned property.

This decision provides no strategem by which citizens may be deprived of the use of publicly owned recreational facilities.

2. Whether the respondent's operations in this case constitute State action presents a substantial federal question which should be independently determined by this Court.

On the undisputed facts, both the District Court and the Court of Appeals held that the Association was not acting on behalf of the City of Louisville or any agency of the State, but as a private individual.

The petitioner states that the decision here with respect to State action is contrary to Kentucky law governing public parks, and relies upon Park Commissioners of Ashland v. Shanklin, 304 Ky. 43, 199 S. W. 2d 721 (1947), and Board of Park Commissioners v. Speed, 215 Ky. 319, 285 S. W. 212 (1926). The petitioner in designating his reasons and grounds for appeal to the Court of Appeals (R. 80-81) did not specify or rely upon this which he now attempts to assert as a "fundamental error" and cannot now assert it.

No substantial federal question is presented by the facts of this case which require this Court to disregard the holdings of two lower federal courts.

3. Decisions among state and lower federal courts with respect to the status of leasing arrangements between municipalities and private organizations are in conflict and should be resolved..

The cases relied upon by petitioner do not reflect a conflict in the decisions as to public and private acts where a public agency owns and a private organization leases a public facility.

Modern Amusements, Inc., v. New Orleans Public Service, 183 La. 848, 165 So. 137 (1935), does not involve publicly owned property; it involves contractual differences between private corporations.

The decisions in Lawrence v. Hancock, 76 F. Supp. 1004; Culver v. City of Warren, 84 Ohio App. 373, 83 N. E. 2d 82 (1948); and Kern v. City Commissioners, 151 Kans. 565, 100 P. 2d 709 (1940), are in complete accord.

The present case can be distinguished from these three swimming pool cases. The similarity of those cases and this case is that all involve the lease of a public facility. The distinction, however, is of importance. In the three swimming pool cases the colored citizens were denied the use of the public facility. Here there is no showing that petitioner has been denied the right to use the public facility involved—the amphitheatre. The petitioner has the same right to use the amphitheatre as does the Association.

In Lawrence v. Hancock (*supra*), at page 1009, the Court recognized the right of a City to lease a public facility for private use as long as other citizens had a similar right.

The same right is recognized in Harris v. City of St. Louis, 233 Mo. App. 911, 111 S. W. 2d 995 (1938), and, therefore, is not in conflict with the swimming pool decisions.

4. The decision below is in conflict with principles established in decisions of this Court, particularly Nixon v. Herndon.

The principle of law governing this case was clearly stated by this Court in Shelley v. Kraemer, 334 U. S. 1, at page 13, wherein it said:

> "Since the decision of this Court in the Civil Rights cases, * * * the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct;"

The lower courts found that Association's creation and presentation of theatrical productions did not constitute it an "arm of the State" and its action of refusing to sell petitioner a ticket to one of its productions was merely private conduct of an individual.

The decision of the lower court is not in conflict with the principle that the City must make a unique piece of public property available for use by all citizens. The lower court pointed out that the petitioner had the same right as Association to use the public property, and had never been denied this right by the City (R. 26, 31, 37). There is no proof that the Association ever denied petitioner the right to use the Amphitheatre.

5. The decision in this case is in conflict with the principles enunciated by this Court in Nixon v. Condon, Smith v. Allright and Terry v. Adams, with respect to the delegation of State authority.

Before the principles enunciated in the primary election cases come into play there must be a determination that there is a governmental function involved.

There is no proof in the record that the creation and presentation of theatrical entertainment is a governmental function.

In substance, the petitioner is here contending that the ownership of an out-door auditorium obligates a City, as a governmental function, to provide every type of activity which can be presented in such a structure. Following such a contention to its conclusion, the petitioner assumes that any person using the structure for any activity is an instrument of the State and is carrying on a governmental function.

The Amphitheatre is well suited for religious services. In allowing a church organization to use the structure, has the City constituted this group an instrument of the State and religious services a governmental function?

The City did not delegate a governmental function to Association in allowing it to use the Amphitheatre as a place to present shows created and presented entirely at Association's expense.

6. The decision of the court below conflicts with well-settled doctrine of this Court that rights guaranteed under the Fourteenth Amendment are personal and present.

There is no conflict between this doctrine and the decisions of the two lower courts. The District Court very carefully pointed out that petitioner had the personal and present right to make the same use of Iroquois Amphitheatre as did the Association (R. 37). The petitioner has never exercised this right, or sought to do so, and has therefore never been denied such right (R. 26, 37).

CONCLUSION.

For the reasons heretofore stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

JAMES W. STITES,
DONALD Q. TAYLOR,
Counsel for Respondent.

July 17, 1953.

Office - Supreme Court, U.
FILED
SEP 17 1953
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

October Term, 1953

No. 85

JAMES W. MUIR,

Petitioner,

versus

LOUISVILLE PARK THEATRICAL ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ROBERT L. CARTER,
THURGOOD MARSHALL,
BENJAMIN F. SHOBE,
Counsel for Petitioner.

ELWOOD H. CHISOLM,
DAVID E. PINSKY,
of Counsel.

Dated: September 14, 1953.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y., BEEKMAN 3-2320
49

INDEX

	PAGE
I. Jurisdiction	1
II. The Questions Presented Are Not Moot	1
III. Petitioner Was Refused Admission Pursuant to Rules and Regulations of the City of Louisville	4
Conclusion	7

Table of Cases Cited

Alejandrino v. Quezon, 271 U. S. 528, 535	3
Atherton Mills v. Johnston, 259 U. S. 13	3
Belcher Land Mortgage Co. v. Hazard Coal Corp., 15 F. 2d 481 (C. A. 6th, 1926)	5
Board of Park Commissioners v. Speed, 215 Ky. 319, 285 S. W. 212 (1926)	4
Chesapeake & O. R. Co. v. City of Morehead, 223 Ky. 698, 4 S. W. 2d 726 (1928)	5
Civil Rights Cases, 109 U. S. 3, 17	6
Culver v. City of Warren, 84 Ohio App. 373, 83 N. E. 2d 82 (1948)	5
Doremus v. Board of Education, 342 U. S. 429	3
Douglas v. Jeanette, 319 U. S. 157, 165	2
Ford Motor Co. v. United States, 335 U. S. 303, 312-13	4
Gray v. University of Tennessee, 342 U. S. 517	3
Great Northern Railway Co. v. Delmar Co., 283 U. S. 686, 691	5
Harris v. City of St. Louis, 233 Mo. App. 911, 111 S. W. 2d 995 (1938)	5
Kern v. City Commissioners, 151 Kans. 565, 100 P. 2d 709 (1940)	5

PAGE

Lawrence v. Hancock, 76 F. Supp. 1004 (S. D. W. Va. 1948) 5
Leslie County v. Maggard, 212 Ky. 354, 279 S. W. 335 (1926) 5

McLaurin v. Oklahoma State Regents, 339 U. S. 637 ... 3

Nash v. Air Terminal Services, 85 F. Supp. 545, 549 (E. D. Va. 1949) 6
Nixon v. Herndon, 273 U. S. 536 6

Park Commissioners of Ashland v. Shanklin, 304 Ky. 43, 199 S. W. 2d 721 (1947) 4
Public Utilities Commission v. United Fuel Gas Co., 317 U. S. 456, 466 3
Public Utilities Commission of the District of Columbia v. Pollak, 343 U. S. 451, 461-62 6

Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 514-15 4
Sweatt v. Painter, 339 U. S. 629 3

Trailmobile Co. v. Whirls, 331 U. S. 40, 48-49 3

United States v. Hamburg-Amerikanische Co., 239 U. S. 466 3
United States v. Trans-Missouri Freight Assoc., 166 U. S. 290 3

Other Citations

17 C. J. S., *Contracts*, Sec. 318 5

Louisville Courier Journal
July 5, 1953 ..... 2n
July 12, 1953 ..... 2n
July 19, 1953 ..... 2n
July 26, 1953 ..... 2n
August 2, 1953 ..... 2n
August 9, 1953 ..... 2n
August 16, 1953 ..... 2n

PAGE

Louisville Defender
July 23, 1953 ..... 2n

Louisville Times
August 11, 1953 ..... 2n

New York Times
June 18, 1953 6

Title 28, U. S. Code, Sec. 1254(1) 1

In the

Supreme Court of the United States

October Term, 1953

No. 85

James W. Muir,

Petitioner,

versus

Louisville Park Theatrical Association,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I.

Jurisdiction.

The statement in the petition for the writ of certiorari that petitioner invokes the jurisdiction of this Court on the basis of Title 28, United States Code, Section 1251(1) is, of course, a typographical error. Jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

II.

The Questions Presented Are Not Moot.

Respondent raises the identical issue of mootness that it asserted in the Court of Appeals. By disposing of this

case on the merits, the Court of Appeals clearly indicated that this contention had no substance. It has no greater merit in this Court.

The petition for the writ of certiorari brought to the attention of the Court the fact that subsequent to the expiration of the 1947-1951 agreement, a new agreement was entered into between respondent and the City for the 1952 summer season. This agreement appears as Appendix A to the petition. While the petition did not state that theatrical performances were presented by respondent during the 1952 season, this is the fact. Significantly, respondent does not deny the existence of the 1952 agreement nor the fact that performances were given pursuant to it. The renewal of the 1952 agreement for the 1953 season was also set forth in the petition. Petitioner can now further advise the Court that musicals were again presented at Iroquois Amphitheatre during the months of July and August, 1953, for a six week season under the respondent's sponsorship.[1] Negroes were again denied admittance.[2] Respondent's Brief in Opposition likewise fails to deny any of the facts relating to 1953.

Respondent's argument thus narrows down to a highly technical contention that this Court is bound by the record and cannot consider events which have transpired subsequently. But this argument necessarily falls by the weight of its own fundamental inconsistency. Respondent's argument necessarily rests on the proposition that a court of equity looks to the future, *Douglas* v. *Jeanette*, 319 U. S. 157, 165, and will normally decide an appeal on the basis

---

[1] The Louisville Courier Journal, July 5, 1953, § 5, p. 2, col. 1; id., July 12, 1953, § 5, p. 1, col. 4; id., July 19, 1953, § 5, p. 1, col. 4; id., July 26, 1953, § 5, p. 1, col. 4; id., Aug. 2, 1953, § 5, p. 1, col. 2; id., Aug. 9, 1953, § 5, p. 1, col. 4; id., Aug. 16, 1953, § 5, p. 1, col. 6. The Louisville Times, Aug. 11, 1953, p. 12, col. 1.

[2] The Louisville Defender, July 23, 1953, p. 1, col. 8.

of circumstances existing at the time of the appeal. *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456, 466; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637. However, in so doing, the Court must necessarily consider circumstances which have transpired subsequent to the entry of judgment in the trial court. This is a well established proposition. In deciding whether a question is moot, this Court will consider facts beyond the record. *Gray* v. *University of Tennessee*, 342 U. S. 517; *Doremus* v. *Board of Education*, 342 U. S. 429; *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 48-49; *Atherton Mills* v. *Johnston*, 259 U. S. 13; *United States* v. *Hamburg-Amerikanische Co.*, 239 U. S. 466; *Alejandrino* v. *Quezon*, 271 U. S. 528, 535.

Similarly, in deciding cases on the merits, this Court has looked beyond the record to consider the effect of circumstances occurring after judgment in the trial court. *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; *United States* v. *Trans-Missouri Freight Assoc.*, 166 U. S. 290, 308-9. In *Sweatt* v. *Painter, supra*, a new Negro law school had been put into operation after judgment had been entered in the trial court. In holding that Texas did not provide a law school education for Negroes equal to that provided for white students, this Court gave full consideration to the facts relating to the better facilities in the new law school. Similarly, in *McLaurin* v. *Oklahoma State Regents*, some of the more onerous restrictions which had been placed on McLaurin were removed between the time the decree was entered in the district court and the time the case was argued in this Court. This Court again looked beyond the record and considered the facts as they existed at the time of argument.

Petitioner merely asks the Court to follow the same procedure applied in *Sweatt*, *McLaurin* and numerous other

cases. Any other course would result in the grossest injustice imaginable. By utilizing successive lease agreements covering only a single summer, respondent could successfully frustrate petitioner's right of appeal, for the agreement in force at the time of the trial would have expired by the time of appeal. *Cf. Southern P. Terminal Co.* v. *Interstate Commerce Comm.*, 219 U. S. 498, 514-15; *Ford Motor Co.* v. *United States*, 335 U. S. 303, 312-13. This Court could hardly sanction such a result.

III.

Petitioner Was Refused Admission Pursuant to Rules and Regulations of the City of Louisville.

1. Respondent misconceives the reason for reliance on *Park Commissioners of Ashland* v. *Shanklin*, 304 Ky. 43, 199 S. W. 2d 721 (1947), and *Board of Park Commissioners* v. *Speed*, 215 Ky. 319, 285 S. W. 212 (1926). Petitioner does not ask the Court to grant the writ of certiorari in order to decide a question of Kentucky law. But we submit that the Kentucky decisions are indirectly relevant. The *Shanklin* and *Speed* cases state that a city department of parks cannot lawfully lease public park property to an independent proprietor and thereby relinquish control over its use. Hence, if the facts relating to the relationship between the City and respondent are at all equivocal—if there is some doubt as to the extent of control exercised by the City over the operations of respondent—this Court is justified in drawing the inference that the parties contracted with full knowledge of state law and thus intended that the City of Louisville retain the right to control the operations of respondent. This is merely an application of the well-established rule that where a contract is susceptible of two meanings, one legal and the other unlawful or contrary to

public policy, the former will be adopted so as to uphold the contract. *Great Northern Railway Co.* v. *Delmar*, 283 U. S. 686, 691; *Belcher Land Mortgage Co.* v. *Hazard Coal Corp.*, 15 F. 2d 481 (C. A. 6th 1926); *Chesapeake & O. R. Co.* v. *City of Morehead*, 223 Ky. 698, 4 S. W. 2d 726 (1928); *Leslie County* v. *Maggard*, 212 Ky. 354, 279 S. W. 335 (1926); 17 C. J. S., *Contracts*, Sec. 318.

2. Petitioner reasserts that the decisions in *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S. D. W. Va. 1948); *Culver* v. *City of Warren*, 84 Ohio App. 373, 83 N. E. 2d 82 (1948); and *Kern* v. *City Commissioners*, 151 Kans. 565, 100 P. 2d 709 (1940), are in sharp conflict with the instant case, notwithstanding respondent's attempt to harmonize them. In all cases Negro citizens were denied the use of a public facility by the use of a leasing arrangement. Any factual distinction between the cases rests on the differences between a swimming pool and an outdoor amphitheatre. A swimming pool is useful only in the summer. On the other hand, an outdoor amphitheatre has some usefulness in the other seasons, although its period of principal utility is certainly the summer months—the period covered by the leases between the City and respondent. Such a distinction between the instant case and *Lawrence*, *Culver* and *Kern* is hardly significant.

The instant case in fact presents a much stronger picture of state action violative of the 14th Amendment than that in any of the swimming pool cases. In the latter cases, as well as in *Harris* v. *City of St. Louis*, 233 Mo. App. 911, 111 S. W. 2d 995 (1938), each of the lessees formulated its own admission policy. No state policy—no state regulation—no state action of any kind was the immediate cause of the refusal to admit Negroes. In the instant case, however, City regulations require racial segregation in the use of the City's parks and Iroquois Park is designated for the exclusive use of white persons (R. 44). Significantly,

respondent, in answer to our fourth reason for the allowance of this writ, does not deny this. Thus, respondent's refusal to admit petitioner Muir and other Negroes was required by state law; and in so acting, respondent clearly acted as an instrumentality of the state in carrying out state policy. *Nixon* v. *Herndon,* 273 U. S. 536; *cf. Civil Rights Cases,* 109 U. S. 3, 17; *Public Utilities Commission of the District of Columbia* v. *Pollak,* 343 U. S. 451; 461-62; *Nash* v. *Air Terminal Services,* 85 F. Supp. 545, 549 (E. D. Va. 1949).

A recent occurrence highlights this point. In June, 1953, there was presented at Iroquois Amphitheatre for a three-week run a musical drama based on the life of President Lincoln. To these performances Negroes were admitted. The New York Times reported on June 18, 1953 that *Mayor Charles P. Farnsley of Louisville had temporarily lifted "[t]he historic ban against admitting Negroes to Louisville's white city parks"* (p. 38, col. 1). This serves to dramatize the crucial fact that it is city policy and city action which determines whether, if at all, Negroes are admitted to Iroquois Amphitheatre. In the light of this, respondent's contention that there is no showing that petitioner has been denied the use of the Amphitheatre becomes especially transparent.

The conclusion thus becomes inescapable that when respondent denied petitioner admittance to the Amphitheatre, it acted for the state and under color of state law.

Conclusion.

WHEREFORE, for the reasons hereinabove stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. CARTER,
THURGOOD MARSHALL,
BENJAMIN F. SHOBE,
Counsel for Petitioner.

ELWOOD H. CHISOLM,
DAVID E. PINSKY,
of Counsel.

Dated: September 14, 1953.

30

FEB 16 1954

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 595

ALEXANDER P. TUREAUD, JR., a Minor, by Alexander P. Tureaud, Sr., his father and next friend,

Petitioner,

vs.

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT L. CARTER,
THURGOOD MARSHALL,
ULYSSES S. TATE,
ALEXANDER P. TUREAUD,
Counsel for Petitioner.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13, BEEKMAN 3-2320
49

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	2
Statement of the Case	2
The Complaint and Hearing on the Motion for Preliminary Injunction	2
The Evidence as to Equality of Facilities	5
Proceedings at the Appellate Level	11
Specifications of Errors to Be Urged	12
Reasons for the Allowance of the Writ	13
Conclusion	21

Table of Cases

American Federation of Labor v. Watson, 327 U. S. 582	13
California Water Service Co. v. Redding, 304 U. S. 252	13, 16
Carter v. School Board of Arlington County, 182 F. 2d 531 (C. A. 4th 1950)	19
Cleveland v. United States, 323 U. S. 329	19, 21
Corbin v. School Board of Pulaski County, 177 F. 2d 924 (C. A. 4th 1949)	19
Edelman v. Boeing Air Transport, 289 U. S. 249	18
Ex Parte Bransford, 310 U. S. 354	18, 19
Ex Parte Hobbs, 280 U. S. 168	18, 19
Ex Parte Williams, 277 U. S. 267	13

PAGE

Foister v. Board of Supervisors, Civil Action No. 937 (E. D. La. 1952) 17, 20, 21

Gray v. Board of Trustees, 97 F. Supp. 463 (Tenn. 1951) 20

Gully v. Interstate National Gas Co., 292 U. S. 16 .. 16

Jameson & Co. v. Moregnthau, 307 U. S. 171 16

McCart v. Indianapolis Water Co., 302 U. E. 419 18

Missouri ex rel Gaines v. Canada, 305 U. S. 337 17

Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U. S. 386 13

Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290 13

Payne v. Board of Supervisors, Civil Action No. 894 (E. D. La. 1952) 17, 20, 21

Phillips v. United States, 312 U. S. 246 .....13, 16, 18, 19

Plessy v. Ferguson, 163 U. S. 573 17

Rorick v. The Everglades Drainage Dist., 307 U. S. 208 18

Sipuel v. Board of Regents, 332 U. S. 631 17

Spielman Motor Sales Co. v. Dodge, 295 U. S. 89 20

Watch Tower Bible & Tract Soiety v. Bristol, 24 F. Supp. 57 (Conn. 1938), aff'd 305 U. S. 572 20

Wichita Falls Junior College v. Battle, 204 F. 2d 632 20

Wilson v. Board of Supervisors, 92 F. Supp. 986 (E. D. La. 1950) 14, 16, 17, 20

IN THE

Supreme Court of the United States

October Term, 1953

No.

ALEXANDER P. TUREAUD, JR., a Minor, by Alexander P. Tureaud, Sr., his father and next friend,

Petitioner,

vs.

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on October 28, 1953.

Opinions Below

The opinion, findings of fact and conclusions of law of the District Court (R. 21-30) is reported in 116 F. Supp. 248. The opinion of the Court of Appeals (R. 35-45) is reported in 207 F. 2d 807.

Jurisdiction

The judgment of the Court of Appeals was entered on October 28, 1953 (R. 45). Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1251(1). On November 16, 1953 this Court stayed the judgment of the Court of Appeals, pending the filing and final disposition of this petition for writ of certiorari. An order extending the time for filing this petition from January 26, 1954 to February 16, 1954 was granted on January 26, 1954 (R. 47).

Question Presented

Whether this is a cause which must be heard and determined by a district court of three judges pursuant to Title 28, United States Code, Section 2281 et seq.

Constitutional Provision Involved

Article XII, Section I of the Constitution of Louisiana provides as follows:

The educational system of the state shall consist of all free public schools, and all institutions of learning supported in whole or in part by appropriations of public funds. Separate free public schools shall be maintained for the education of white and colored children between the ages of six and eighteen years.

Statement of the Case

The Complaint and Hearing on the Motion for Preliminary Injunction

Petitioner is a minor of 17 years of age. He is a citizen of the United States and a citizen and resident of the State of Louisiana (R. 2). On or about June 5, 1953, petitioner,

being duly qualified, made application for admission at the next regular school term beginning September, 1953, to the first-year class (Junior Division) of Louisiana State University and Agricultural and Mechanical College (R. 5), an institution of higher learning maintained and supported by the State of Louisiana. Petitioner desired to pursue a combined course in arts and science and law offered under the curriculum of the College of Arts and Sciences and the School of Law. Those successfully completing this course receive both an A.B. or B.S. degree and an LL.B. degree in six rather than seven years (R. 4-5). On or about August 8, 1953, petitioner was advised by respondent, John A. Hunter, registrar of the University, of the rejection of his application (R. 6) pursuant to the University's policy of "not admitting Negro students to that area." (Pre-trial depositions, p. 52.) Whereupon, petitioner, by his father and next friend, instituted the present litigation.

In his complaint, petitioner made application for a temporary and permanent injunction to restrain respondents from refusing solely on the basis of race and color to admit him and other Negroes similarly situated to Louisiana State University to pursue the combination course in arts and science and law (R. 2, 8, 11). Jurisdiction was invoked under Title 28, United States Code, Section 2281 (R. 2). Petitioner sought a hearing and determination by a district court of three judges of his application to enjoin respondents from refusing to admit him to Louisiana State University in the enforcement and execution of a state statute and order of the respondent Board of Supervisors barring the admission of Negroes to the University. It was alleged that the statute and order were in conflict with the federal Constitution.

The District Judge, however, taking the view that a three-judge court was not required, ordered the case set down for hearing before him sitting alone. Petitioner abandoned his claim to a hearing before a specially con-

stituted federal court as required under Title 28, United States Code, Section 2281 and proceeded without protest to a hearing on the motion for preliminary injunction. No proof tending to establish a claim of the unconstitutionality of segregation *per se* was submitted. Rather the evidence dealt solely with whether the educational opportunities, offerings and facilities at Southern University, the state-supported institution of higher learning for Negroes, were equal or substantially equal to those available at Louisiana State University with respect to the combination course desired (see depositions, findings of fact and appendix thereto of the District Court). Respondents filed a motion to dismiss and a return and answer (R. 13). After hearing on the motion for preliminary injunction and consideration of the evidence presented, including pre-trial depositions and catalogues of Louisiana State University (introduced as Plaintiff's Exhibit #1) and of Southern University (introduced as Plaintiff's Exhibit #3), the court, on September 11, 1953, denied respondent's motion to dismiss, and found that petitioner was denied his constitutional right to receive equal educational opportunities by being refused admission to Louisiana State University. The court, thereupon, issued the temporary injunction applied for, restraining respondents from refusing to admit petitioner to the Junior Division of Louisiana State University to pursue the combination course in arts and science and law for which he had applied (R. 32).

The evidence adduced at the pre-trial depositions, and from the catalogues of Louisiana State University and Southern University which is set out in substance in the appendix to the District Court's findings of fact (R. 27 *et seq.*), amply supports the court's findings of fact that petitioner could not receive at Southern University educational opportunities equal to those available at Louisiana State University.

The Evidence as to Equality of Facilities

1.

LOUISIANA STATE UNIVERSITY

Respondents offer a combination arts and science and law course at Louisiana State University whereby a student may complete the requirements for and receive an A.B. or B.S. and an LL.B. degree in six years rather than in seven years (Catalogue of Louisiana State University 1953-1955 [hereafter referred to as Pl. Ex. #1], pp. 77 and 151); a combination course in commerce and law (Pl. Ex. #1, pp. 113 and 151), and in geology and law (Pl. Ex. #1, pp. 100 and 151).

SOUTHERN UNIVERSITY

Southern University offers a combination course in political science and law, English and law and mathematics and law (Catalogue of Southern University [hereafter referred to as Pl. Ex. #3], pp. 208-210). Very few students have undertaken this course and no degree under this program has been awarded at Southern (depositions, p. 88). At present only one applicant has applied for the combination curriculum (depositions, p. 89).

2.

LOUISIANA STATE UNIVERSITY

Louisiana State University operates on an annual budget of $12,000,000 (depositions, p. 12). It has 6400 students (depositions, p. 54) with a per capita operating cost of $1875.00 per student. It is composed of 17 major administrative divisions, including a Junior Division, a Junior College, a Junior Term, a General Extension Division, a University College (for those unable to attend regular day sessions, Pl. Ex. #1, pp. 160-161) and 12 other colleges with various divisions, departments and schools within these colleges (Pl. Ex. #1, p. 37), and offers bachelors degrees at the college level, masters and doctoral degrees at the gradu-

ate school level, and various degrees at the professional school level (P. Ex. #1, p. 37). It is a member of the Southern Association of Colleges and Secondary Schools (depositions, p. 9).

SOUTHERN UNIVERSITY

Southern University operates on an annual budget of $2,000,000 (depositions, p. 59). There are approximately 2900 students enrolled in the college proper (depositions, p. 73) with a per capita cost of $689.65 per student. With the exception of the law school, the entire instruction offered is at the college level (depositions, p. 59). It is in fact a general college (depositions, p. 59). The institution is approved by the Southern Association of Colleges and Secondary Schools, but unlike Louisiana State University is not a member of that accrediting agency (depositions, p. 59). There are 150 regular faculty members outside the law school in the entire University (depositions, p. 60), including 91 instructors, 30 assistant professors, 16 associate professors and 16 full professors (depositions, p. 71).

3.

LOUISIANA STATE UNIVERSITY

At the college level is the Junior Division (where all first year college work is concentrated), the College of Agriculture, the College of Chemistry and Physics, the College of Commerce, the College of Education, the College of Engineering, the College of Arts and Sciences and a School of Music (Pl. Ex. #1).

SOUTHERN UNIVERSITY

The college offers a program of freshman studies (Pl. Ex. #3, pp. 69-73 incl.). It contains a Division of Agriculture (Pl. Ex. #3, p. 74) as compared with a College of Agriculture at Louisiana State University; a Division of Business (Pl. Ex. #3, p. 86) as compared with a College

of Commerce at Louisiana State University; a Division of Education (Pl. Ex. #3, p. 100) as compared with a College of Education at Louisiana State University; a Division of Health and Physical Education (Pl. Ex. #3, p. 131); a Division of Home Economics (Pl. Ex. #3, p. 138); a Division of Industrial and Technical Education (Pl. Ex. #3, p. 146); a Division of Military Science and Tactics (Pl. Ex. #3, p. 196); a Division of Music (Pl. Ex. #3, p. 201) as compared with the School of Music at Louisiana State University and a Division of Liberal Arts and Sciences (Pl. Ex. #3, p. 162) as compared with a College of Arts and Sciences at Louisiana State University.

4.

LOUISIANA STATE UNIVERSITY

The College of Arts and Sciences is headed by Dean Cecil G. Taylor, who holds a Ph. D. degree (depositions, p. 15, and Pl. Ex. #1, p. 93). It contains 18 departments in the following fields: Air Science; Books and Libraries; Botany; Bacteriology and Plant Pathology; English; Fine Arts; Foreign Languages (Classical, Germanic and Slavic and Romance); Geography and Anthropology; Geology; Government; History; Journalism; Mathematics; Military Science; Philosophy; Psychology; Sociology; Speech; and Zoology, Physiology and Entomology (Pl. Ex. #1, p. 93). The college is staffed by 160 regular faculty members plus an additional instructional force below the faculty rank (depositions, p. 34). Of the regular faculty staff of 160, approximately 25% are assistant professors, 25% are associate professors, and 25% are of full professional rank (depositions, p. 35). Between 600 and 700 students are enrolled (depositions, p. 16). The goal of the college is to secure as instructors those who hold Ph. D. degrees in their respective fields (depositions, p. 35). The Dean's salary is $9700 (depositions, p. 40).

SOUTHERN UNIVERSITY

The Division of Liberal Arts and Sciences is composed of nine departments including the departments of Fine and Applied Arts; Biology; Chemistry; Physics (as compared to the College of Chemistry and Physics at Louisiana State University), English; Mathematics; Modern Foreign Languages; Psychology; and Social Sciences. There are some 66 regular faculty members including a part-time instructor (Pl. Ex. #3, pp. 164, 167, 170, 177, 172, 176, 179, 181, 182). It should be noted that there is no department of Air Science; Books and Libraries; Botany; Bacteriology and Plant Pathology; Geography and Anthropology; Geology; Government; History; Journalism; Philosophy; Sociology; Speech; or Zoology. It should also be noted that Greek, Germanic and Slavic Languages, Italian and Portuguese are not taught.

Dean J. D. Cade who holds an M.A. degree (Pl. Ex. #3, p. 8) is dean of the College and Director of the Division of Liberal Arts and Sciences (Pl. Ex. #3, p. 163). He receives a salary of $7200 (depositions, p. 97). The requirement at Southern for an instructorship is a Master's degree (Pl. Ex. #3, p. 72).

5.

LOUISIANA STATE UNIVERSITY

In the College of Arts and Sciences, the catalogue indicates that the Department of Books and Libraries has two instructors and offers two courses (Pl. Ex. #1, p. 181); the Department of Botany, Bacteriology and Plant Pathology has eleven faculty members and offers 37 courses (Pl. Ex. #1, pp. 181-182); the Department of Ancient and Modern Foreign Languages has two professors in Classical Languages and offers 17 courses (Pl. Ex. #1, p. 174), 3 teachers of German, Slavic and Russian languages and offers 17 courses (Pl. Ex. #1, pp. 174-175), and 12 teachers of Romance languages, offering 23 courses in French, 2 in

Italian, 2 in Portuguese, 20 in Spanish and 2 in Romance Philology and Bibliography (Pl. Ex. #1, pp. 175-178); the Department of English has 33 teachers and offers 64 courses (Pl. Ex. #1, pp. 201-203); the Department of Fine Arts has 12 teachers and offers 42 courses (Pl. Ex. #1, p. 203); the Department of Government has 5 professors and offers 32 courses (Pl. Ex. #1, p. 212); the Department of History has 10 teachers and offers 38 courses (Pl. Ex. #1, pp. 218-219); the Department of Journalism has 6 teachers and offers 19 courses (Pl. Ex. #1, pp. 223-224); the Department of Mathematics has 25 teachers and offers 38 courses (Pl. Ex. #1, pp. 225-226); the Department of Philosophy has 3 teachers and offers 22 courses (Pl. Ex. #1, pp. 234-235); the Department of Psychology has 9 teachers and offers 44 courses (Pl. Ex. #1, pp. 238-239); the Department of Sociology has 11 professors and offers 41 courses (Pl. Ex. #1, pp. 243-245); and the Department of Zoology, Physiology and Etomology has 11 teachers and offers 45 courses (Pl. Ex. #1, pp. 252-255).

SOUTHERN UNIVERSITY

Within the Division of Liberal Arts and Sciences at Southern, the catalogue indicates that the Department of Fine and Applied Arts has 3 faculty members and offers 18 courses (Pl. Ex. #3, pp. 164-166); the Department of Biology has 12 faculty members, with one on leave, and offers 31 courses (Pl. Ex. #3, pp. 167-170); the Department of Chemistry has 4 faculty members and offers 11 courses (Pl. Ex. #3, pp. 170-172); the Department of English has 17 faculty members, one of whom is designated as part time, and offers 27 courses, including 6 courses in English Composition and Journalism and 11 courses in Speech (Pl. Ex. #3, pp. 173-176); the Department of Mathematics has 7 faculty members and offers 11 courses (Pl. Ex. #3, pp. 176-177); the Department of Physics has 3 faculty members and offers 5 courses (Pl. Ex. #3, pp. 177-178); the Depart-

ment of Modern Foreign Languages has 4 teachers, with one on leave, and offers 10 courses in Spanish, 4 in German and 9 in French (Pl. Ex. #3, pp. 179-181); the Department of Psychology has one teacher and offers 10 courses (Pl. Ex. #3, pp. 181-182); the Department of Social Sciences has 15 faculty members, with one on leave, and offers 96 courses—15 courses in Economics, 12 in Geography, 30 in History, 22 in Political Science, 15 in Sociology and 2 in Anthropology (Pl. Ex. #3, pp. 182-193).

6.

LOUISIANA STATE UNIVERSITY

Louisiana State University offers a combined course in arts and sciences and law, geology and law, and commerce and law as indicated. After completion of the Junior Division, a student must complete prescribed minimum requirements for the arts and science degree (Pl. Ex. #1, p. 96) and he may receive the remainder of the necessary credits for his degree by choosing from a variety of electives, within certain limitations as set out in Plaintiff's Exhibit #1, page 96 and depositions, pages 30-33. After completion of the Junior Division a student who at first matriculated for the arts and sciences and law course may switch to geology and law without loss of time or credits (depositions, p. 33). There is no question but that this combination curriculum is a working program and going concern.

SOUTHERN UNIVERSITY

Southern University offers a combination curriculum in 3 fields as previously indicated. The program is fixed as set forth in the school catalogue (Pl. Ex. #3, pp. 208-210). No deviation from the course of study there prescribed is permissible under Southern's program (depositions, pp. 97-98).

7.

EVIDENT CONCLUSIONS

a. With respect to the combined arts and sciences and law curriculum at Louisiana State University as contrasted with the combination curriculum at Southern, the student pursuing the course at Louisiana State University has far greater advantages and opportunities than a student at Southern.

b. The combination curriculum at Louisiana State University is a well-organized, well-functioning program. At Southern, on the other hand, while the course exists on paper, as yet no degree has been awarded under this program and only one student has indicated interest at the present school term.

c. The Louisiana State University student in the College of Arts and Sciences has 160 regular faculty members available of which 75% are of professional rank. The students at Southern have only 66 faculty members available in the Division of Liberal Arts, and if the Division in rank follows that in the entire college, approximately 40% of these are of professional status.

d. The variety of courses offered is greater than at Southern and the student has opportunity to obtain a richer and more diversified background in Liberal Arts than is possible under Southern's program.

Proceedings at the Appellate Level

Respondents appealed to the United States Court of Appeals. That Court on October 28, 1953, with one judge dissenting, reversed the judgment of the District Court on the ground that the District Judge was without jurisdiction since this was a case which should have been heard and determined by a district court of three judges (R. 45).

Petitioner applied to this Court for a stay of the judgment of the Court of Appeals, which application was granted on November 16, 1953. On January 26, 1954, an order was issued extending the time for the filing of this petition until February 16, 1954 (R. 47).

Specifications of Errors to Be Urged

The Court of Appeals Erred:

1. In holding that the case should have properly proceeded pursuant to the requirements of Title 28, United States Code, Section 2281 *et seq.* and that, therefore, the judgment of the District Court was a nullity.

2. In holding that petitioner, in proceeding to hearing before the District Court, in failing to press his claim *in re* the constitutionality of segregation *per se* and in merely resting his case upon the inequality of educational facilities and opportunities, had not waived and abandoned his right to a hearing before a district court of three judges.

3. In holding in effect that a district judge may not view the case in its totality and properly refuse to convene a three-judge court rather than be bound by the mere formal averments of the complaint.

4. In holding that this case was required to be heard by a district court of three judges despite the fact that the basic issue—the right of Negroes to attend Louisiana State University where other equal educational opportunities were not available—was not one of first impression in the court below.

Reasons for the Allowance of the Writ

I. Settlement of the question presented here is clearly necessary because it involves an important question of federal procedure and practice. In construing Title 28, United States Code, Section 2281 *et seq.*, this Court has evolved rules and regulations designed to protect the administration of state laws against hasty and improvident invalidation by federal courts and at the same time protect the public need for efficient administration of the federal judicial system. Since the problem here raised is likely to arise in a large variety of cases where injunctive relief against denial of civil rights is being sought, it should be determined by this Court.

II. The decision of the Court of Appeals is in conflict with the basic principles enunciated by this Court defining the reach and application of Title 28, United States Code, Sections 2281 and 2284.

A. Title 28, United States Code, Sections 2281 and 2284, may be properly invoked only when injunctive relief is sought against state legislative policy as defined in state constitutions or statutes or in the orders of state administrative agencies on the ground that the state's policy as thus defined is unconstitutional under the Constitution of the United States. *Phillips* v. *United States*, 312 U. S. 246; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386; *American Federation of Labor* v. *Watson*, 327 U. S. 582; *Ex Parte Williams*, 277 U. S. 267; *California Water Service Co.* v. *Redding*, 304 U. S. 252.

1. No constitutional or statutory provision of the State of Louisiana forbids the admission of petitioner or of Negroes similarly situated to Louisiana State University and Agricultural and Mechanical College on the grounds of

race and color. Petitioner cites Article XII, § 1 of the Constitution which provides as follows:

> The educational system of the state shall consist of all free public schools, and all institutions of learning supported in whole or in part by appropriations of public funds. Separate free public schools shall be maintained for the education of white and colored children between the ages of six and eighteen years.

It should be noted here that racial segregation is made mandatory only with respect to free public schools. Obviously, this provision does not include Louisiana State University. No reference is made in the above-mentioned constitutional provision, or indeed in any state statute which petitioner's counsel has been able to find, concerning the racial composition of the student body at Louisiana State University and Agricultural and Mechanical College. The Court's attention is also directed to *Wilson* v. *Board of Supervisors*, 92 F. Supp. 986, 988 (E. D. La. 1950), appeal dismissed 340 U. S. 909, in which counsel for both the Negro applicant and the University conceded and the Court found that there were no state statutes or constitutional provisions which by their terms specifically forbade the admission of Negroes to Louisiana State University and Agricultural and Mechanical College. Therefore, it does not appear that the claim of an unconstitutional legislative policy forbidding petitioner's admission to Louisiana State University because of race as defined in the statutes or constitutional provisions of the State of Louisiana appearing in petitioner's amended complaint (R. 2, 5) can be sustained.

2. There is no state legislative policy in the form of delegated legislation by an administrative body or agency which prohibits petitioner or other Negroes similarly situated from being admitted to Louisiana State University

because of their race and color. Reference is made in paragraph 8 of the amended complaint to an order of the Board of Supervisors of Louisiana State University excluding Negroes from all colleges and undergraduate departments (R. 5). No proof of the existence of any such order, however, was established by either petitioner or respondents in any of the proceedings in this case. Petitioner's rejection is based by respondents upon an established University policy, custom and usage (pre-trial depositions, pp. 8, 52). The closest evidence relative to the existence of such an order occurs in the following exchange between counsel for petitioner and the President of the University (depositions, pp. 8, 9):

"Q. Are you familiar with the application of the plaintiff in this action, Mr. Tureaud's application?

A. Yes, sir.

Q. Will you tell me, advise me, why, what reason he was refused admission?

A. Because it has been a tradition and a policy of the university of long standing that we do not admit Negro students.

Q. Has this policy been the policy set by the Board of Supervisors?

A. I presume it was set many years ago, I wouldn't know, but it has been a policy so long as I have been there. I have been there about 23 years.

Q. How were you advised of the policy, General Middleton?

A. Well, at first it was through custom.

Q. At first it was through custom, and now what is it on?

A. I think it was 1951 the question of entrance of Negro students was discussed at a Board meeting. The Board advised me that when a Negro student applied for admission, to refuse the admission and report my actions to the Board.

Q. I see. So that in refusing the admission of the plaintiff in this action, you were acting pursuant to the order of the Board of Supervisors?
A. That's right."

There is no evidence that any formal order barring petitioner or other Negroes was ever issued by the Board of Supervisors. Indeed, the President was pursuing a policy which had been in existence longer than the 23 years he had been connected with the University. Unlike *Wilson* v. *Board of Supervisors, supra,* where the Board of Supervisors promulgated and published a specific order barring Wilson's admission, no such action was taken here. The advice of the Board to the President of the University would not appear to be delegated state legislation of an administrative board or agency sufficient to satisfy the jurisdictional requirements of Title 28, United States Code, Section 2281 as defined by this Court in *Phillips* v. *United States,* 312 U. S. 246, 251.

B. Even where there is in existence state statutes or orders of administrative agencies whose constitutionality is under attack, the jurisdictional requisites sufficient to properly invoke Title 28, United States Code, Section 2281 are not met unless the claim of unconstitutionality is substantial. *Ex Parte Bruder,* 271 U S. 461; *Jameson & Co.* v. *Morgenthau,* 307 U. S. 171; *Gully* v. *Interstate National Gas Co.,* 292 U. S. 16; *California Water Service Co.* v. *Redding, supra.*

Although the averments of unconstitutionality are made in the amended complaint, proof was directed solely to the establishment of the fact that petitioner's rejection was illegal because he was not able to obtain equal educational opportunities. The invalidity of the enforcement of segregation laws under such circumstances is too firmly settled,

see *Plessy* v. *Ferguson*, 163 U. S. 573; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Sipuel* v. *Board of Regents*, 332 U. S. 631, to warrant the needless expense and drain upon the federal judiciary which is necessarily involved in the convening of a district court of three judges under the mandate of Title 28, United States Code, Section 2281.

It should be added further that the legal claim litigated and resolved by the District Court—the right of petitioner to attend Louisiana State University because the educational opportunities and facilities at Louisiana State University were superior to those available at Southern University, the state-supported institution for Negroes—was not a question of first impression. Within the past three years this same question has been before the District Court, and on each occasion the Negro applicant has been ordered admitted to Louisiana State University. See *Wilson* v. *Board of Supervisors, supra; Foister* v. *Board of Supervisors*, Civil Action No. 937 (E. D. La. 1952); *Payne* v. *Board of Supervisors*, Civil Action No. 894 (E. D. La. 1952). And, moreover, the basic issue was heard and determined in the first instance by a district court of three judges in *Wilson* v. *Board of Supervisors, supra*. The basic issue having been decided consistently with the decisions of this Court, the necessity for relitigation of each successive claim before a specially constituted court appears to be not only unnecessary but wasteful.

C. Where an applicant has properly made a claim of unconstitutionality sufficient to warrant a hearing and determination by a three-judge court, such claim may be abandoned and the matter properly litigated before a single district judge. *Ex Parte Hobbs*, 280 U. S. 168; *Edelman* v. *Boeing Air Transport*, 289 U. S. 249; *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419. The decision of the Court of Appeals (R. 38-39) concedes that such an abandonment may be made. Yet the fact that petitioner failed to press his

claim as to the unconstitutionality of segregation *per se*, and rested his case solely on the ground that his exclusion from Louisiana State University was a denial of his constitutional rights in that there were no other equal facilities available within the state, was not considered a sufficient abandonment by the Court of Appeals. As such the decision appears to be in direct conflict with the rationale of this Court in *Ex Parte Hobbs, supra.*

D. Title 28, United States Code, Sections 2281 and 2284, were designed to secure the public interest in a limited class of cases of special importance and to make certain that state legislation would not be invalidated by a conventional suit in equity. In view of the fact that the procedural device entails a serious drain upon the federal judicial system and upon the appellate docket of the United States Supreme Court, the statute has been construed as an enactment of the greatest technicality which must be strictly and closely construed. *Phillips* v. *United States*, 312 U. S. 246; *Rorick* v. *The Everglades Drainage Dist.*, 307 U. S. 208; *Ex Parte Bransford*, 310 U. S. 354.

Under the decision of the Court of Appeals, where the formal averments of unconstitutionality are made, even though petitioner may decide to proceed before a single district judge and rest his suit on a theory of law firmly foreclosed by decision of this Court, the district judge nevertheless is without jurisdiction to hear the cause but must convene a three-judge court. This, we submit, gives a far more liberal construction of Section 2281 than is warranted by the application of principles enunciated in decisions of this Court. See *Ex Parte Hobbs, supra; Phillips* v. *United States, supra; Ex Parte Bransford, supra.*

III. There is confusion and conflict among the Courts of Appeal as to the appropriate application of Title 28, United States Code, Section 2281 *et seq.*, particularly in the areas

of controversy involved in the instant case and this confusion and conflict should be resolved by this Court.

Illustrative of this confusion and conflict are the following:

A. Under the instant decision, a court of three judges is required where the necessary formal jurisdictional averments are made in the complaint in spite of the complainant's acquiescence in having a hearing before a single district judge: (1) even though the suit as pressed merely seeks admission of a Negro applicant to the state university on the grounds of absence of equal educational opportunities and facilities, and (2) in the absence of a state statute or order of an administrative board or agency which by its terms prohibits petitioner's admission to the state university because of race.

B. The Fourth Circuit in *Carter* v. *School Board of Arlington County*, 182 F. 2d 531 (CA 4th 1950), and in *Corbin* v. *School Board of Pulaski County*, 177 F. 2d 924 (CA 4th 1949), found nothing procedurally amiss in a conventional suit in equity seeking injunctive relief against state officers denying to Negroes equal educational advantages and opportunities. In both cases a statute of the State of Virginia expressly required segregation of Negro and white students at the educational levels involved. Thus, in both instances the officials were enforcing a policy of statewide application and concern. See *Cleveland* v. *United States*, 323 U. S. 329. While the complaint in both cases did not seek to invoke jurisdiction under Section 2281, if the present decision is correct, cases of this nature must at all times be brought and heard before a three-judge district court.

C. In *Gray* v. *Board of Trustees*, 97 F. Supp. 463 (Tenn. 1951), vacated as moot, 342 U. S. 517, a complaint properly drawn to satisfy the jurisdictional prerequisites of Section

2281 *et seq.* was held not to present a substantial claim of unconstitutionality sufficient to warrant determination by a court of three judges. Rather the case was treated as one merely presenting a claim of denial of equal facilities, determination of which was appropriate in an ordinary suit in equity.

IV. There is a conflict within the Fifth Circuit itself on this question which should be resolved by this Court. The district judge and one member of the Court of Appeals in this case take the view that this is an appropriate case to be determined by a single judge. Two other judges on the Court of Appeals have a contrary position. In the same district court involved here, after *Wilson* v. *Board of Supervisors, supra,* had been decided, *Foister* v. *Board of Supervisors,* and *Payne* v. *Board of Supervisors, supra,* were decided without the convening of a specially constituted district court of three judges. In both cases jurisdiction was invoked under Title 28, United States Code, Section 2281 and injunctive relief was sought to enjoin the officials of Louisiana State University, respondents here, from refusing to admit Negroes to Louisiana State University.

Further, *Wichita Falls Junior College* v. *Battle,* 204 F. 2d 632 (pending here on petition for writ of certiorari), where the complaint sought injunctive relief against the refusal of the state officials to admit Negroes to the Wichita Falls Junior College, was held not to be a case requiring a hearing before a court of three judges. The Wichita Falls Junior College case cannot be put to one side on the theory that only local officers were involved. Segregation of the races in the educational institutions of Texas is a statewide policy, and it was this policy which was being enforced. As such, without regard to the geographical limitations set to their authority, the school officials were state officers within the meaning of Title 28, United States Code, Section 2281. *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89; *Watch Tower Bible & Tract Society* v. *Bristol,*

24 F. Supp. 57 (Conn. 1938), aff'd 305 U. S. 572; *Cleveland* v. *United States,* 323 U. S. 329. Hence that decision as well as the aforementioned *Foister* and *Payne* decisions are inconsistent with the holding in this case.

Conclusion

WHEREFORE, for the reasons hereinabove stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. CARTER,
THURGOOD MARSHALL,
ULYSSES S. TATE,
ALEXANDER P. TUREAUD,
Counsel for Petitioner.

31

MAR 15 1954
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 595

ALEXANDER P. TUREAUD, JR., a Minor, by Alexander P. Tureaud, Sr., his father and next friend,

Petitioner

versus

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, ET AL.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

FRED S. LEBLANC,
Atty. Gen. of Louisiana
W. C. PERRAULT,
First Asst. Atty. Gen.
J. CLYDE PEARCE,
Asst. Atty. Gen.
J. H. TUCKER, JR.,
FRED BLANCHE,
ARTHUR O'QUIN,
VICTOR A. SACHSE,
R. B. SADLER, JR.,
W. SCOTT WILKINSON,
LEANDER H. PEREZ,
C. C. BUD, JR.,
L. W. BROOKS,
JAMES R. FULLER,
C. V. PORTER,
H. C. SEVIER,
A. J. SHEPARD, JR.,
GROVE STAFFORD,
OLIVER STOCKWELL,
WOOD THOMPSON,
Attorneys for Respondents.

TAYLOR, PORTER, BROOKS, FULLER & PHILLIPS,
1106 Louisiana National Bank Building,
Baton Rouge, Louisiana;

WILKINSON, LEWIS & WILKINSON,
P. O. Box 1707,
Shreveport, Louisiana,

Of Counsel.

Franklin Press, Inc. Baton Rouge, La.

INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Question Presented 2

Constitutional Provision Involved 2

Statement of the Case 2

Argument 7

Conclusion 15

AUTHORITIES

Title 28, United States Code

Section 1251 (1) 1

Section 1331 7

Section 1343 7

Section 2281 ..... 2, 6, 7, 9

Section 2284 ..... 4, 6, 9

Section 1, Fourteenth Amendment of the Constitution of the United States 3

Civil Rights Acts, Section 41 of Title 8 of United States Code 3

Stratton v. St. Louis Southwestern Railway Co., 282 U. S. 101, 75 L. Ed. 135 10

Query v. United States, 316 U. S. 486, 489, 86 L. Ed. 1616, 1619, 1620 11

Briggs v. Elliott (S. C.), 98 F. S. 529, Dkt. 101 11

Brown v. Board of Education (Kansas), 98 F. S. 797 11

Bolling v. Sharpe (D. C.), 21 Law Week 3132, Dkt. 413 11

Davis v. County School Board, 103 F. S. 337, Dkt. 191 11

Wilson v. Board of Supervisors, 92 F. Supp. 986, 340 U. S. 908, 910, 95 L. Ed. 657 ..... 12, 13

Foister v. Board of Supervisors, No. 937 Civil Action, E. D. Louisiana 12, 13

Payne v. Board of Supervisors, No. 894 Civil Action, E. D. Louisiana 12, 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 595

ALEXANDER P. TUREAUD, JR., a Minor, by Alexander P. Tureaud, Sr., his father and next friend,

Petitioner

versus

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, ET AL.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

May It Please the Court:

OPINIONS BELOW

The opinion, findings of fact and conclusions of law of the District Court (R. 21-30) are reported in 116 F. Supp. 284. The opinion of the Court of Appeals (R. 35-45) is reported in 207 F.2d 807.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1251 (1).

QUESTION PRESENTED

The sole question presented to this Court is whether or not the decision of the Court of Appeals for the Fifth Circuit holding that petitioner's application for injunctive relief should have been heard and determined by a three judge court pursuant to Title 28, United States Code, Section 2281 et seq., is correct.

CONSTITUTIONAL PROVISION INVOLVED

Article XII, Section 1 of the Constitution of Louisiana, 1921, is involved. No statute is implicated.

STATEMENT OF THE CASE

Petitioner, a resident of Louisiana, brought this action on his own behalf and on behalf of all other Negro citizens of the United States, residing in the State of Louisiana, for a declaratory judgment permitting him and others similarly situated to enter the Louisiana State University and Agricultural and Mechanical College (hereinafter sometimes referred to as "Louisiana State University"), a school reserved for white persons only. (R. 1-12.)

Jurisdiction was invoked under the Civil Rights Acts of the United States and under Title 28 of the United States Code, Section 2281. (R. 1-2.)

Petitioner averred that he sought entrance into the Junior Division of the College of Arts and Sciences at Louisiana State University in order to pursue a combined curriculum leading to the Bachelor of Arts Degree and the Bachelor of Laws Degree. He stated that on or about June 5, 1953, he applied for admission to Louisiana State University as a freshman desiring to pursue the combined liberal arts curricu-

lum in said College of Arts and Sciences and law course in the Law School, that he furnished a transcript of his high school credits and filled out the customary application blanks. He averred that at the time of the application, he possessed all the scholastic, moral and other lawful qualifications prescribed by the laws of the State of Louisiana, that he was willing and able to pay all lawful fees and charges, and would conform to all lawful, uniform laws and regulations of the University. (R. 5-6.) He further alleged that the combined courses could be completed by him in the Louisiana State University in six years, and "There is no other institution or school maintained by the State of Louisiana at which plaintiff can obtain the advantages involved in the combination courses here offered nor combine his college and law school work to the same extent and on equal level of scholarship and intensity as in schools of the Louisiana State University." (R. 5-6.)

He alleged further that defendants have pursued and are pursuing a policy of excluding Negroes from all colleges and undergraduate departments of Louisiana State University pursuant to the Constitution and laws of the State of Louisiana, because of their race or color, and that their action in denying plaintiff and other Negroes similarly situated admission to the Junior Division of the Louisiana State University because of their race or color is a violation of the plaintiff's and other Negroes' privileges and immunities as citizens of the United States, and a deprivation of their liberty and property without due process of law, and the equal protection of the laws, secured by *Section 1 of the Fourteenth Amendment of the Constitution of the United States*, and rights secured by the *Civil Rights Acts, Section 41 of Title 8 of the United States Code.* (R. 6-7.)

He prayed that a three-judge court be convened immediately as required by Title 28, United States Code, Section 2284 (R. 8) and for a preliminary injunction restraining defendants from enforcing or executing against plaintiff and other Negroes similarly situated, *the order* of the defendant Board of Supervisors excluding Negroes from the University as provided in the Constitution and laws of the State of Louisiana, and that after due hearing a permanent injunction be issued.

The defendants first moved to dismiss the action on the grounds: (1) because the plaintiff, a minor, is incompetent to institute or maintain the action or to stand in judgment herein as shown by the allegations of the complaint, (2) because the complaint fails to state a claim upon which relief can be granted upon class action since the alleged right sought to be enforced is a personal one and can only be enforced if the plaintiff has a personal and present right, and the court should not grant any injunctive relief whatsoever with respect to unnamed parties whose qualifications and eligibility for admission to Louisiana State University depends upon the judgment and decision of the University's representatives in evaluating the qualifications of the applicant in any individual case. In the alternative, defendants' motion avers that the plaintiff can assert no interest on behalf of others in other colleges, departments or divisions of the University.

Reserving all rights under the motion to dismiss, the defendants answered the application for preliminary injunction, and denied generally all of the allegations therein contained. Defendants especially denied the averment of the complaint that there is no other institution maintained by Louisiana at which plaintiff could obtain the advantages involved in the combined curriculum of fine arts and law as in the schools of

Louisiana State University, and obtain the degrees of Bachelor of Arts and Bachelor of Laws in six years. Defendants averred that plaintiff could pursue such a combined curriculum and obtain these two degrees at Southern University, located five miles north of Baton Rouge, and that at Southern University, which is reserved for Negroes exclusively, plaintiff can obtain equal or substantially equal advantages and opportunities in pursuing the courses and obtaining the education which he desires.

Defendants admitted that plaintiff applied for admission to the Louisiana State University and furnished a transcript of his credits, and admitted that the laws of the State of Louisiana set forth in paragraphs 7-8 of the complaint justified the defendants' action in rejecting the plaintiff's application, but defendants averred that there are reasons for rejecting such application other than the reason that the plaintiff is a Negro.

Defendants denied that their action denied or will deny plaintiff and other Negroes of any right secured to them by the Constitution and laws of the United States, and denied that any irreparable injury will result from the actions of the defendants.

Defendants averred that the Constitution and laws of the State of Louisiana require segregation of the white and Negro races, and that the state and its agencies are acting pursuant to their police power in excluding Negroes from schools reserved for whites and vice versa; that Louisiana has spent and presently is spending many millions of dollars in the establishment of separate schools and colleges for the two races; that such expenditures are being made for the purpose of providing equal facilities and opportunities for all citizens

of the state regardless of race and color. Defendants stated that the policy of the State of Louisiana in this regard is based upon interpretations given by the courts and Congress to the *Thirteenth and Fourteenth Amendments of the Constitution of the United States*, and any changes made in such interpretations at this time and any interference in the exercise of the police power of the state in this respect would destroy the value of Louisiana's investment in education, disrupt its school system and result only in confusion and inefficiency in its educational system.

Although the complaint prayed for the appointment of a three-judge court to hear and determine plaintiff's application for injunctive relief, the District Judge failed and refused to summon the statutory court and proceeded to hear the application for preliminary injunction upon the pleadings and affidavits. After such hearing, judgment was granted in favor of plaintiff and a temporary injunction was issued enjoining and restraining the defendants pending the final determination of this action in carrying out the orders of the Board of Supervisors of the Louisiana State University complained of, and enjoining the defendants from refusing because of race and color to admit the plaintiff and any other Negro of the state similarly situated and qualified to the Junior Division of the Louisiana State University for the purpose of pursuing the combined arts and sciences and law courses offered by the Louisiana State University.

Defendants moved for a new trial, urging, among other things, that jurisdiction of the subject matter was vested in a three-judge court as provided by law, particularly by *28 U. S. Code, Sections 2281 and 2284*. The motion was overruled, and defendants then applied to the Court of Appeals for the Fifth

Circuit for a stay order, and appealed from the judgment issuing a preliminary injunction. All defenses urged in the District Court were renewed in the Appellate Court, and the case was argued on its merits on the application for a preliminary injunction. However, the Court of Appeals, speaking through Chief Judge Hutcheson, held that the District Judge was without jurisdiction to hear and determine the application for injunction, that the matter should have been heard and determined by a three-judge court, and hence, the order of the District Judge was vacated and the cause was remanded to the District Judge with directions to take further proceedings not inconsistent with the Court's opinion. (R. 35-41.) Judge Rives dissented, assigning written reasons. (R. 41-45.)

Plaintiff did not apply for a rehearing, but instead applied to this Court for a stay order, which was granted, and then filed his petition for certiorari.

ARGUMENT

Plaintiff invoked the jurisdiction of the District Court under Title 28, United States Code, Sections 1331, 1343 and 2281. (Amended complaint, R. 1-2.) In sub-paragraph (c) of paragraph 1 of the amended complaint (R. 2) he alleged as follows:

> "The jurisdiction of this Court is also invoked under Title 28, United States Code, section 2281. This is an action for an interlocutory injunction and a permanent injunction restraining the action of *officers* of the State of Louisiana in the enforcement of *statutes* of the State of Louisiana and the execution of and the enforcement of an *order* made by defendant Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College, acting as an administrative board or com-

> mission under statutes of such State, as hereinafter more fully appears." (Emphasis supplied.)

In paragraph 7 of the amended complaint (R. 5) he alleges:

> "Article XII, Section 1, of the Constitution of Louisiana, 1921, provides as follows:
>
> " 'Separate free public schools shall be maintained for the education of white and colored children between the ages of six and eighteen years.' "

Plaintiff stated in paragraph 8 of his amended complaint (R. 5):

> "The Louisiana State University and Agricultural and Mechanical College was established in the year 1876. Throughout the existence of the Louisiana State University and Agricultural and Mechanical College, defendant, the Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College, has maintained and pursued the uniform policy of restricting admission to the undergraduate department of said institution to white students. *Defendant, Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College, acting as an administrative board or commission of the State of Louisiana under statutes of said State, has made and established an order excluding, because of their race or color, plaintiff and all other Negroes otherwise qualified, residing in the State of Louisiana*, from all colleges, and undergraduate divisions of the Louisiana State University and Agricultural and Mechanical College." (Emphasis supplied.)

Further reference to the alleged order of respondent Board of Supervisors of Louisiana State University and Agricultural and Mechanical College is made in paragraph 13 of the amended complaint (R. 7), which reads as follows:

"Plaintiff is informed and believes, and therefore alleges upon information and belief, that but for the laws of the State of Louisiana set forth in paragraph 7 hereof, defendants would not have established and would not be enforcing or executing *the order* set forth in paragraph 8 hereof, and would not have pursued and would not be pursuing the policy, practice, custom and usage of denying his admission because of his race and would not have deprived and would not continue to deprive plaintiff, and other Negroes similarly situated, of his or their rights secured by the Constitution and laws of the United States, and hereinbefore and hereinafter more fully set forth." (Emphasis supplied.)

In paragraph 1 of the prayer of the amended complaint (R. 8), plaintiff prayed as follows:

"That this Court immediately convene a Three-Judge Court, as required by Title 28, United States Code, section 2284."

It is, therefore, clear that jurisdiction of the District Court was invoked in order to enjoin and restrict the action of officers of the State of Louisiana in the enforcement of statutes of that state and the execution of and the enforcement of an alleged order made by respondent, Board of Supervisors.

United States Code, Title 28, Section 2281, provides that where an interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute by restraining the action of any *officer* of such state in the enforcement or execution of such *statute* or of an *order* made by any administrative board or commission acting under such state statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application is heard and determined by a district court of three judges. We quote Section 2281:

"§ 2281. Injunction against enforcement of State statute; three-judge court required

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968."

A reading of the amended complaint, particularly the above quoted paragraphs, shows that the issues fit exactly into the legal pattern outlined in Section 2281. This section was interpreted in *Stratton v. St. Louis Southwestern Railway Co.*, 282 U. S. 101, 75 L. Ed. 135, as follows:

"If an application for an interlocutory injunction is made and pressed to restrain the enforcement of a state statute, or of an administrative order made pursuant to a state statute, upon the ground that such enforcement would be in violation of the Federal Constitution, a single judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. He is as much without power to dismiss the bill on the merits as he would be to grant either an interlocutory or a permanent injunction. His authority is strictly limited to granting, upon proper cause being shown, a temporary restraining order to be effective only pending the determination of the application for an interlocutory injunction. Upon making such an order, it is his duty immediately to call two other judges, as the statute directs, to assist him in hearing and determining that application."

In the later case of *Query v. United States*, 316 U. S. 486, 489-90, 86 L. Ed. 1616, 1619, and 1620, this Court made it quite clear that cases of this kind can only be decided by the statutory three-judge court, saying:

> "If no more than a question of construction of a federal statute had been involved, there would have been no necessity for a three-judge court pursuant to § 266."
>
> ". . . But the complainants sought to restrain the state officers from enforcing the state statute upon the ground of the unconstitutionality of the threatened application. Not only was unconstitutionality the ground asserted by the complaints for the relief sought, but it appears that the relief awarded was predicated on the same ground. Cf. Wilentz v. Sovereign Camp, W. W. 306 U. S. 573, 576, 85 L. Ed. 994, 997, 59 S. Ct. 709."

Plaintiff here seeks to restrain state officers from enforcing state statutes on the ground that the threatened application of these statutes will deny plaintiff his rights under the Federal Constitution, and the relief awarded by the District Judge was predicated on this ground. Under such circumstances relief in the form of an injunction can be awarded only by a three-judge court.

This Court is presently considering the question of whether or not segregation in public education is illegal *per se* in four cases which were decided by statutory three-judge courts and appealed directly to the Supreme Court. Those cases are:

Briggs v. Elliott (S. C.), 98 F. S. 529, Dkt. 101.

Brown v. Board of Education (Kansas), 98 F. S. 797.

Bolling v. Sharpe (D. C.), 21 Law Week 3132, Dkt. 413.

Davis v. County School Board, 103 F. S. 337, Dkt. 191.

Those cases involve legal issues similar to those presented in the case at bar. If they had not been properly tried by a three-judge court this Court would not be entertaining these cases on direct appeal.

In those cases where a three-judge court has declined jurisdiction it will be noted that state officers were not involved as here.

In the petition for certiorari (R. 17), petitioner states that within the past three years the same question presented here was before the same district court, and in each case the Negro applicant was ordered admitted to Louisiana State University. He cites *Wilson v. Board of Supervisors*, 92 F. Supp. 986; *Foister v. Board of Supervisors*, No. 937 Civil Action, Eastern District of Louisiana; and *Payne v. Board of Supervisors*, No. 894 Civil Action, Eastern District of Louisiana. A three-judge court heard plaintiff's application in *Wilson v. Board of Supervisors*. The *Foister* and *Payne* cases were not heard by a three-judge court, even though the plaintiffs asked that one be convened under said Section 2281.

Defendants did not raise the jurisdictional question in either the *Foister* or *Payne* case. Moreover, the facts in the three cases were very dissimilar to the facts in the instant case. The *Wilson* case involved the application of a Negro to be admitted to the Law School of Louisiana State University. The main defense urged by defendants was that equal facilities were afforded at Southern University, which is a Negro university located, as is Louisiana State University, at Baton Rouge. On the facts presented there the District Court decided for the plaintiff, and its decision was affirmed by the Court of Appeals for the Fifth Circuit, and also by this Court, on motion of plaintiff. See per curiam opinion reported in *340 U. S.*

908, 910, 95 L. Ed. 657. The *Foister* case was filed by a Negro applicant for admission to the School of Medicine, Department of Nursing Education, of Louisiana State University, and the *Payne* case was filed by a Negro applicant for admission to the Graduate School of said University. As there is no other state-supported medical school or state-supported graduate school in the State of Louisiana, plaintiff in each case readily obtained a preliminary injunction, and those applicants were admitted. This complaint, however, was filed by a Negro applicant seeking admission to the freshman class of Louisiana State University with the expressed intention of seeking a Bachelor of Arts Degree and then a Bachelor of Laws Degree during a period of six years. Different from the *Wilson*, *Payne* and *Foister* cases, there are two other state-supported schools where plaintiff can obtain a B. A. Degree, which offer equal, or substantially equal, facilities according to defendants' contention.

Petitioner contends that where an applicant has properly made a claim of unconstitutionality sufficient to warrant a hearing and determination by a three-judge court, such claim may be abandoned and the matter properly litigated before a single district judge. (Petition, p. 17). This claim was urged in plaintiff's original complaint filed on August 21, 1953, as well as in his amended complaint filed on August 27, 1953. (The only substantial change in the amended complaint is that respondent Board of Supervisors in the original complaint was sought to be served through Tom W. Dutton, President, whereas in the amended complaint it was sought to be served through J. Stewart Slack, Chairman.) An order for hearing on plaintiff's application was signed by Honorable J. Skelly Wright on August 20, 1953, pursuant to plaintiff's original application. No subsequent order was issued. In his supple-

mental complaint filed August 27, 1953, plaintiff again demanded that the matter be tried by a three-judge court. The record is barren of any pleading indicating that he has ever abandoned his prayer for a three-judge court. Such contention of plaintiff is answered by Chief Judge Hutcheson as follows (R. 38-39):

> "It is true that plaintiff has it in his own hands to determine by the allegations of his complaint, in the first instance, whether a three judge court should be summoned, and, further, if, as originally drawn, his complaint presents a case for three judges, he may by amendment to or abandonment of his claim requiring the constitution of a three judge court, enable the district judge to proceed alone. This was many times taken advantage of, under the statute before it was amended to provide a three judge court in all cases where an injunction was sought, by the action of the plaintiff, if he desired one judge action, in dismissing his prayer for interlocutory injunction. Emphatically, however, the statute does not permit the district judge to pick and choose among the allegations of a complaint and, ignoring those which require the constitution of a three judge court, proceed with the case *as though those allegations had never been in, or had been dismissed from, the complaint.*"

As the sole question presented to this Court is the jurisdictional one (Petition, p. 2), we shall not presume upon the time of this Court to discuss the evidence as to whether or not the facilities are equal. We assume that this Court will not consider the merits of the case, even if it should decide that the District Judge alone had jurisdiction to hear and determine the cause, and that in such event the action will be remanded to the Court of Appeals to decide the other defenses, including the merits. However, if we are mistaken, and if Your Honors

should desire to consider the merits of the controversy, we urge that we be allowed additional time to brief the same.

CONCLUSION

For these reasons, and for the reasons stated in the majority opinion of the Court of Appeals for the Fifth Circuit, the plaintiff's petition for certiorari should be denied.

Respectfully submitted,

FRED S. LEBLANC,
Atty. Gen. of Louisiana
W. C. PERRAULT,
First Asst. Atty. Gen.
J. CLYDE PEARCE,
Asst. Atty. Gen.
J. H. TUCKER, JR.,
FRED BLANCHE,
ARTHUR O'QUIN,
VICTOR A. SACHSE,
R. B. SADLER, JR.,
W. SCOTT WILKINSON,
LEANDER H. PEREZ,
C. C. BIRD, JR.,
L. W. BROOKS,
JAMES R. FULLER,
C. V. PORTER,
H. C. SEVIER,
A. J. SHEPARD, JR.,
GROVE STAFFORD,
OLIVER STOCKWELL,
WOOD THOMPSON,
Attorneys for Respondents.

TAYLOR, PORTER, BROOKS, FULLER & PHILLIPS,
1106 Louisiana National Bank Building,
Baton Rouge, Louisiana;

WILKINSON, LEWIS & WILKINSON,
P. O. Box 1707,
Shreveport, Louisiana,

Of Counsel.

March 10, 1954.

MAY 24, 1954.*

Decisions Per Curiam.

No. 9. FLORIDA EX REL. HAWKINS ET AL. *v.* BOARD OF CONTROL OF FLORIDA ET AL. On petition for writ of certiorari to the Supreme Court of Florida;

No. 85. MUIR *v.* LOUISVILLE PARK THEATRICAL ASSOCIATION. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit; and

No. 595. TUREAUD *v.* BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petitions for writs of certiorari are granted. The judgments are vacated and the cases are remanded for consideration in the light of the Segregation Cases decided May 17, 1954, *Brown* v. *Board of Education, ante*, p. 483, and conditions that now prevail.

Robert L. Carter and *Thurgood Marshall* for petitioners. *Ulysses S. Tate* and *Alexander P. Tureaud* were also with them in No. 595. *Richard W. Ervin*, Attorney General of Florida, and *Frank J. Heintz, Ralph M. McLane* and *Howard S. Bailey*, Assistant Attorneys General,

*MR. JUSTICE JACKSON took no part in the consideration or decision of cases in which orders are this day announced.